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CASES

ARGUED AND DETERMINED

IN

Ebenezer Dumont

The Court of Common Pleas,

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED,
AND OF THE PRINCIPAL MATTERS.

By JAMES MANNING,
SERJEANT AT LAW,
AND
T. C. GRANGER,
OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW.

VOL. III.

FROM MICHAELMAS VACATION, 1841, TO EASTER TERM, 1842,
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JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir NICOLAS CONYNGHAM TINDAL, Knt. Ld. Ch. J.

The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.

Hon. Sir THOMAS COLTMAN, Knt.

The Right Hon. THOMAS ERSKINE.

Hon. Sir WILLIAM HENRY MAULE, Knt.

ATTORNEY GENERAL,

Sir F. POLLOCK, Knt.

SOLICITOR GENERAL,

Sir W.W. FOLLETT, Knt.

A

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term,

IN THE

FOURTH AND FIFTH YEARS OF THE REIGN OF VICTORIA.

1841.

The judges who usually sat in banc during this term were,

TINDAL C. J.	ERSKINE J.
COLTMAN J.	MAULE J.

AMOR *v.* CUTHBERT.

May 22.

ASSUMPSIT, for 100*l.* for goods sold and delivered, money lent, money paid, and on an account stated.

Assumpsit, for goods sold and delivered, money lent, money paid, and on an account stated. Pleas: first, non assumpsit; secondly, the statute of limitations; thirdly, payment; fourth-

The defendant pleaded, — first, non assumpsit; secondly, the statute of limitations; thirdly, payment; and, fourthly, that the plaintiff before, &c. was, and still is, indebted to the defendant in divers sums of money, to wit, in 58*l.* 15*s.*, upon a certain judgment which the defendant on, &c., before Her Majesty's justices of the Bench at *Westminster*, recovered against the plaintiff in a certain action on promises, whereby it was considered that the defendant should recover against the

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plaintiff the said sum of 58*l.* 15*s.* for his damages, which he had sustained, as well by reason of the not performing of certain promises before then made by the plaintiff to the defendant, as for his costs and charges by him about his suit in that behalf expended; whereof the plaintiff was convicted; as by the record, &c.; which judgment still remained in full force and effect not reversed, annulled, discharged, satisfied, or made void, and which the defendant was ready to verify by the said record; and in 200*l.* for goods sold, 200*l.* for money lent, 200*l.* for money paid, 200*l.* for money had and received, and 200*l.* for money found due upon an account stated; and that such moneys so due and owing from the plaintiff to the defendant as aforesaid exceeded the damages sustained by the plaintiff by reason of the non-performance by the defendant of the promises in the declaration mentioned, and out of which moneys so due and owing from the plaintiff to the defendant as aforesaid, he, the defendant, was ready and willing, and thereby offered, to set off and allow to the plaintiff the full amount of his said damages, according to the form of the statute in such case made and provided. Verification.

The plaintiff joined issue on the first, second, and third pleas; and to the fourth replied (except as to so much of it as related to the judgment in that plea mentioned), that he was not at the time of the commence-

ly, a set-off of 58*l.* 15*s.* upon a judgment, and 200*l.* for goods sold and delivered, money lent, &c. The plaintiff joined issue on the plea of non assumpsit, and traversed the other pleas, except as to so much of the plea of set-off as related to the judgment; and as to so much of the declaration as would be satisfied by the setting off of the judgment, he entered a *nolle prosequi*. At the trial the plaintiff proved that the defendant was, at the commencement of the action, indebted to him in 28*l.* 16*s.* 11*d.*, and no more, for goods sold and delivered and money lent, accruing within six years. The defendant gave no evidence of any payment, or of any matter of set-off, beyond that which was admitted on the record: Held, that the defendant was entitled to the verdict on the first and second issues, and the plaintiff, to the verdict on the third and fourth issues.

Held also, that the effect of a *nolle prosequi* entered as to any portion of a plaintiff's demand, before trial, is to withdraw that part of his claim from the consideration of the jury; but that such entry leaves the part of the claim so withdrawn, so entirely unaffected by the verdict as to entitle the plaintiff to maintain a fresh action in respect of it.

ment of the suit, nor then was, indebted to the defendant, *modo et formâ*. As to so much of the plea of set-off as related to the judgment, the plaintiff proceeded as follows: "And inasmuch as he cannot deny that he was, and is, indebted to the defendant on the said judgment in the said plea in that behalf alleged, he freely admits the same; and therefore the plaintiff will not further prosecute his suit against the defendant in respect of so many of the promises in the declaration mentioned as are satisfied by the said judgment's being so set-off by the defendant as aforesaid."

At the trial before *Maule* J., at the sittings at *Westminster* after *Trinity* term last, the defendant was proved to be indebted to the plaintiff in 28*l.* 16*s.* 11*d.* for goods sold and delivered, and for money lent, independently of four items in the particulars of demand, which were barred by the statute of limitations. The defendant having given no evidence in support of the third and fourth pleas, the jury said, that they found for the plaintiff on the first issue, damages 28*l.* 16*s.* 11*d.*, and also for the plaintiff on each of the other issues. The learned judge, however, directed the verdict to be entered for the defendant on all of the issues, upon the ground that the set-off, admitted by the replication to the fourth plea, exceeded the amount which the jury had found to be due to the plaintiff from the defendant, — leave being reserved to the plaintiff to move to enter the verdict for him, or to enter a special statement on the postea.

Channell Serjt., in *Michaelmas* term last, moved for a rule to shew cause, why the verdict, entered for the defendant, should not be set aside, and a verdict entered on all the issues for the plaintiff; or why the plaintiff should not be at liberty to make a special indorsement

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Nov. 5.

on the postea, reducing the sum of 58*l.* 15*s.*, the amount admitted by the pleadings to be due to the defendant, by the sum of 28*l.* 16*s.* 11*d.* found by the jury to be due to the plaintiff. [*Tindal* C. J. It is not usual to come to the court to ask for directions as to the manner of entering the postea.] In this case the application to the court is necessary, in consequence of the course which the cause took at the trial. The jury returned a verdict for the plaintiff; and the verdict for the defendant, which now appears on the postea, was an alteration made by order of the learned judge. A rule nisi being granted,

Bompas Serjt. now shewed cause. The defendant is clearly entitled to retain the verdict entered for him at the trial. The *nolle prosequi* is, to so many of the promises in the declaration as are satisfied by the judgment; and the effect of it is, to strike out such promises, to the amount of 58*l.* 15*s.* The question therefore is, whether the plaintiff proved any contract beyond that sum. [*Tindal* C. J. *Goodee* v. *Goldsmith* (*a*) closely resembles this case.] There, to a declaration in assumpsit for money had and received, the defendant pleaded as to all, except 3*l.* 5*s.*, non assumpsit, and also a set-off; and, as to 3*l.* 5*s.*, payment of that sum into court. The plaintiff, by his replication, admitted the set-off, and replied that he would not further prosecute his suit except as to the 3*l.* 5*s.*, which sum he took out of court. It was held that the defendant was entitled to his costs on the first two issues. *Parke* B. there says, "The replication amounts, in effect, to a *nolle prosequi*. If there has been a *nolle prosequi* to a count, or part of a count, the costs follow, by the statute 3 & 4 *W.* 4. *c.* 42. *s.* 23. The plaintiff has abandoned his cause of action

(*a*) 2 *M.* & *W.* 202., 5 *Dowl. P. C.* 288.

on the general issue and the set-off. He will be entitled to costs as to that part of the cause of action in respect of which money is paid into court, but the defendant to the costs on the other] issues." (*a*) That case shews that the defendant is entitled to the verdict upon the first, and also on the third issue with respect to the set-off. [*Tindal* C. J. Did you give any evidence in support of the plea of set-off?] No evidence was gone into upon that point. The question is whether, when nothing is proved by the plaintiff to be due, the defendant is not entitled to the verdict on that plea. It would have been absurd (*b*) for the defendant to prove any thing to be due to him by way of set-off, when the plaintiff had closed his case without shewing that any debt was due to him from the defendant. It is submitted, that the defendant has a right to retain the verdict on all the issues. He clearly would be so entitled, if the amount covered by the *nolle prosequi* is to be considered as struck out of the declaration.

Channell Serjt. in support of his rule. It does not follow, that because the plaintiff may not be entitled to judgment, he has not a right to have the verdict on all the issues entered for him; for the question, whether the plaintiff or the defendant is entitled to judgment, is distinct from the right of each party to have particular issues found for him. The right to plead a set-off depends upon the statutes (*c*); and the defendant is, with regard to such set-off, in the situation of a plaintiff. (*d*)

(*a*) 2 *Mees. & W.* 204. And see 5 *Dowl. P. C.* 290.

(*b*) Except with reference to the question as to the costs of the issue.

(*c*) 2 *G.* 2. *c.* 22., and 8 *G.* 2. *c.* 24. As to *recouper*, or deduction by way of set-off at common law, in respect of a cross demand arising out of the *same* transaction, see *Mann. Dig.* 253.

(*d*) *Vide Remington* v. *Stevens*, 2 *Stra.* 1271.; *Bull. N. P.* 180.; *Dowsland* v. *Thompson*, 2 *W. Bla.* 910.

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Here, the plaintiff having a demand only for 28*l.* 16*s.* 11*d.*, and the defendant's judgment amounting to 58*l.* 15*s.*, it may be conceded that the plaintiff cannot issue execution for his debt; but he is entitled to deduct it from the defendant's judgment, and he cannot do so without having a verdict entered for him for the amount. Supposing there was no *nolle prosequi* (*a*) on the record, although the plaintiff could not have judgment, yet the verdict on that issue being entered for him, he would have the benefit of the deduction. It is apprehended that there is no difference as regards this case between debt and assumpsit. If non assumpsit had been the only plea on the record, the jury must have found that the defendant did promise to the amount of 28*l.* 16*s.* 11*d.* There was no question as to the plea of set-off that could have been left to the jury. The only two questions which could have been left to them were, whether the plaintiff had proved any thing to be due to him, and, if so, whether it had been paid. It would have been different if the defendant had admitted the plaintiff's demand, and relied on his set-off. All that the plaintiff has done, is to admit the debt due from him on the judgment; for the *nolle prosequi* is mere surplusage.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. After stating the pleadings (*b*), his lordship proceeded as follows: —

The cause came on for trial before my brother *Maule*, when the plaintiff proved that the defendant was, at the commencement of the action, indebted to him, for goods

(*a*) If a *nolle prosequi* had not been entered, and the plaintiff had replied *nul tiel record*, then, upon a judgment for the defendant, *quod perfecit recordum*, the plaintiff would have been entitled to retain his verdict on the general issue, though he would not have been entitled to judgment, *quod recuperet*.

(*b*) *Antè*, p. 1.

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sold and money lent, in the sum of 28*l.* 16*s.* 11*d.*, but failed in proving any further sum to be due within six years; and he also proved that no part of this sum had been due for more than six years. No evidence was given by the defendant of any payment by him, or of any set-off, beyond the amount admitted on the record. The jury found, accordingly, that the defendant was indebted to the plaintiff in the said sum of 28*l.* 16*s.* 11*d.*; and thereupon the learned judge directed the verdict on all the issues to be entered for the defendant, with leave for the plaintiff to move to have those issues, or some of them, entered for him; which he has done; and the question for the court to determine is, whether the plaintiff is entitled to have the postea amended, by entering the verdict upon any of the issues for him the plaintiff.

Upon the argument, it was admitted that the plaintiff would not be entitled to *judgment* in his favour, even if all the issues should be entered for him (*a*); but it was contended, that as he had proved that 28*l.* 16*s.* 11*d.* was due to him at the commencement of the suit, the issue on the plea of non assumpsit (*b*) as to that sum, should be found for him; and that as the defendant failed to prove either of the issues raised on the other pleas, the verdict on those issues should also be for the plaintiff. This would undoubtedly have been the correct mode of making up the record, if it had not been for the *nolle prosequi* with which the replication concludes; and the question is, whether that part of the replication ought to be confined to the plea of set-off, or whether, on the contrary, it ought to be applied, and held to extend, to all the other issues joined on the record.

(*a*) *Vide post*, 11. (*a*), par. 2.

(*b*) If the plaintiff was entitled to a verdict on non assumpsit, he was also entitled to a verdict on non assumpsit *infra sex annos*, the 28*l.* 16*s.* 11*d.* having accrued within that period, *antè*, p. 2. Upon the third and fourth issues the proof lay on the defendant.

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In form, the *nolle prosequi* is entered upon the record as a part of the replication to the fourth plea; and if that circumstance would have the effect of confining its operation to the issue tendered on that plea, it would present no obstacle to the plaintiff's application, to have the verdict on the general issue entered for him for the amount found by the jury to have been due to him at the commencement of the suit; and then the defendant would have been entitled to *judgment* upon the whole record, by reason of the debt admitted to be due from the plaintiff exceeding in amount the claim proved to be due to him. (*a*)

But the effect of a *nolle prosequi*, whether it extends to the whole or to part only of the cause of action, must be governed by the express terms of the entry—whether by such terms it is confined to any particular issue raised by the pleas, or is extended to the whole cause of action as stated upon the declaration; and, therefore, if a plaintiff enter a *nolle prosequi* as to a plea that covers the whole cause of action, the defendant is entitled to enter up judgment on the whole record, notwithstanding there may be an issue joined upon the plea of non assumpsit; *Peters* v. *Croft*. (*b*) In this case the defendant could not so sign judgment; because although the plea of set-off was pleaded in bar to the whole action, the set-off admitted to be due (and as to which the *nolle prosequi* is entered), would not necessarily cover all the causes of action mentioned in the declaration; and the defendant was, consequently, obliged to go to trial; but when by the finding of the jury it appeared that the set-off admitted exceeded the amount due to the plaintiff, the entry of the *nolle prosequi* must be taken to cover the whole cause of action, and to entitle the defendant to judgment on the whole record.

(*a*) *Vide post*, 11. n., par. 2. (*b*) 6 *Scott*, 897.

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The counsel for the plaintiff, however, insists, that although the defendant may, at all events, be entitled to *judgment* on the whole record, yet the *verdict* on the plea of the general issue should be entered for the plaintiff; first, to entitle him to the costs of that issue, and next, that it may appear upon the record, what portion of the 58*l.* 15*s.* admitted to be due to the defendant, has been liquidated and satisfied by the set-off. But the effect of a *nolle prosequi* entered as to any portion of the plaintiff's demand before trial, is, to withdraw that part of his claim altogether from the consideration of the jury, and to leave it so entirely unaffected by the verdict, as to entitle him to maintain a fresh action in respect of it. (*a*) By adding the *nolle prosequi* there-

(*a*) In 1 *Wms. Saund.* 207. n. (2) it is said, "The true nature and extent of a *nolle prosequi* in civil cases, was not accurately defined and ascertained until modern times. The authorities upon this subject in the old books are contradictory and confused. In some of the cases it is considered in the nature of a retraxit, operating as a release or discharge of the action, and an absolute bar to any future action for the same cause; *Co. Litt.* 139. *a.*; *Cro. Jac.* 211. *Beecher* v. *Shirley*; *Cro. Eliz.* 762. *Green* v. *Charnock*. And therefore in trespass against two who pleaded several pleas it was held, that if the plaintiff entered a *nolle prosequi* against one before he had obtained judgment against the other, it would destroy the action as to both; see 14 *Edw.* 4., 6 pl. 2. *S. C. Bro. Trespass*, 331.; *Hob.* 70, *Parker* v. *Sir John Lawrence*, *S. C.* 2 *Roll. Abr.* 100. pl. 1. So where plaintiff, after verdict for him in debt upon bond, entered a *nolle prosequi*, and brought a new action, it was held an absolute bar to such action; *Cro. Eliz.* 762., *Green* v. *Charnock*.

"But, in other cases, which have been adhered to ever since, a *nolle prosequi* is considered not to be of the nature of a retraxit or release, but an agreement only not to proceed either against some of the defendants, or as to part of the suit."

It may be doubted whether any alteration of the law has taken place, except with regard to the rule laid down by *Littleton* and adopted by the whole court of Common Pleas, in the Year-book, *T.* 14 *Edw.* 4. fol. 6. pl. 2., correctly abridged by Lord *Brooke*, viz. that in no case where an action is brought against two or three, can the plaintiff relinquish his suit against one and pray his judgment against the other, as by such prayer he would abate his own writ; but that after obtaining judgment against one, he

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fore to the admission of the defendant's set-off on the judgment for 58*l.* 15*s.*, the plaintiff has, in effect, confined his right to enter a verdict on the general issue, to such sum as he might prove to be due to him beyond the sum so covered by the *nolle prosequi*; and, consequently, if the court were now to direct that the verdict on the plea of non assumpsit should be entered for the plaintiff as as to the 28*l.* 16*s.* 11*d.*, that sum must be taken as the amount of money due to the plaintiff *over and above* the 58*l.* 15*s.*, and the plaintiff, before a court of error, which could not look beyond the record, would be entitled to judgment. We are therefore of opinion that the verdict on the first issue has been properly entered for the defendant; and, as some of the early items

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may relinquish his action against the other. It is indeed settled that a plaintiff may, before judgment, enter a *nolle prosequi* as to one defendant, and proceed against the other. This, however, would scarcely be allowed, even now, under the circumstances mentioned in 14 *Edw.* 4., where the plaintiff wished to relinquish his action against one of the defendants who had pleaded a plea (arbitrament in trespass), which, if admitted to be true, would shew that the plaintiff had no cause of action against either.

There appears to be no contradiction between the old doctrine, that the entry of a *fatetur se ulterius nolle prosequi de placito prædicto*, generally, should operate as a perpetual bar, and the modern doctrine, that the entry of a *nolle prosequi* as to some defendants, or as to part of the cause of action, should operate as "an agreement only not to proceed against some of the defendants, or as to part of the suit." In either of the latter cases, the plaintiff would have sufficient cause of action left, to enable him to proceed, whether he is to be considered as having perpetually, or as having only temporarily, abandoned his right of action as to the person, or the part, in respect of whom, or of which the *nolle prosequi* is entered.

Supposing, however, the entry of the *nolle prosequi* in the principal case could be regarded as a *retraxit* as to the cause of action relinquished, it would appear to be void, not being entered by the plaintiff in person, as there can be no *retraxit* by attorney. *Co. Litt.* 139 *a.* In this view of the case the entry of the *nolle prosequi* would be a nullity, and the plea of set-off on the judgment would stand upon the record unanswered and unnoticed. And see *Bowden* v. *Horne*, 7 *Bingh.* 716.

of the plaintiff's particulars of demand are of a date beyond six years from the commencement of the suit, we think the verdict on the second issue should also be entered for the defendant. But as the issues joined upon the pleas of payment, and set-off, were entirely on the defendant, we think, as he has failed to establish either of them in proof, the verdict on those issues should be entered for the plaintiff.

Rule accordingly. (*a*)

(*a*) Suppose the plaintiff had declared for 58*l.* 15*s.* for goods sold, and 28*l.* 16*s.* 11*d.* for money paid, and the defendant had pleaded the above four pleas, but had expressly applied the set-off on the judgment to the count for goods only, and the plaintiff had entered a *nolle prosequi* as to the count for goods, and that at the trial the plaintiff had proved a demand to the extent of 28*l.* 16*s.* 11*d.*; if the 28*l.* 16*s.* 11*d.* was wholly for goods, the verdict, on non assumpsit, must have been found for the defendant, agreeably to the principle of the above decision; but if the 28*l.* 16*s.* 11*d.* arose wholly, or in part, for money paid, the defendant would have been entitled to a verdict wholly or *pro tanto*, upon that part of the plea of non assumpsit which put in issue the first count. In the principal case the plaintiff declared upon promises to pay moneys amounting to 100*l.* The effect of the *nolle prosequi* was to reduce that sum to 41*l.* 5*s.* If the 28*l.* 16*s.* 11*d.* proved at the trial, formed part of the 58*l.* 15*s.*, the plaintiff proved nothing but what he had abandoned; but if it formed part of the 41*l.* 5*s.*, the plaintiff would appear to be entitled to a verdict on all the issues. This seems to raise the question whether there was any thing in the case to shew to what part of the 100*l.* the *nolle prosequi* was intended to apply. As nothing was shewn upon this point, it might be said that the plaintiff meant to abandon what he was unable to prove, and not what he could and did prove.

It was *admitted*, — and the admission was acted upon by the court, — that however the verdict was entered, the judgment must be for the defendant, the set-off exceeding the debt. This would be clearly so, if the set-off were pleaded to the debt which it exceeded. That is the ordinary case. But where the effect of a set-off is merely to neutralize something which is afterwards withdrawn from the record, the same consequence does not seem to follow. If *A.* declares against *B.* upon a note for 50*l.*, and also upon a note for 40*l.*, to which *B.* pleads non assumpsit and a set-off upon a judgment for 50*l.*, and *A.* enters a *nolle prosequi* as to the note for 50*l.*, *in respect of the set-off*, the result would be a verdict for the plaintiff on non assumpsit for 40*l.*; yet it would

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hardly be contended, that because the set-off exceeded the 40*l.* found to be due to the plaintiff, the defendant should go thereof without day, and the plaintiff be amerced for his *false* claim, the plaintiff having properly declared for 90*l.*—as he could not compel the defendant to avail himself of his set-off instead of bringing a cross action—and being clearly entitled to recover 40*l.* whether the set-off was brought forward or not.

May 26.

GILBERT and Others *v.* DYNELEY.

By a receivership deed,—appointing *A.* to be receiver of rents and tithes forming the subject of an existing mortgage,—it is covenanted that *A.* shall, in the first place, pay all the costs, charges, and expenses which he shall bear, sustain, incur, or be liable to, in or about the collecting, receiving, and compelling payment of, the said rents and tithes, including therein all expenses of suit, action, process, distress, *and all other charges of management whatsoever;* and that he shall, in the next place, pay all taxes, &c.; and in the next place pay the mortgage interest; and shall, lastly, pay the surplus of the rents and tithes to the mortgagor, deducting and detaining out of such surplus, for his own use, so much as he shall reasonably deserve as a compensation for his care and pains, trouble and expenses, in collecting, receiving, and paying the said rents and tithes, not exceeding 1*s.* in the pound on the gross amount collected:

Held, that *A.* is entitled to deduct and detain out of the rents and tithes received by him, such sums as are reasonably expended by him in collecting the rents and tithes, including salaries paid to collectors, before applying such rents and tithes in satisfaction or in reduction of the mortgage interest.

COVENANT, by the plaintiffs, mortgagees in possession of the *Kingston Rectory* estate, to recover from the defendant the sum of 447*l.* 15*s.* 2*d.* for an alleged breach of his covenant, in not paying over a balance of moneys received by him.

At the trial before *Tindal* C. J., at the *London* sittings after *Hilary* term, 1838, a verdict was found for the plaintiffs, subject to the opinion of the court on the following case:—

By indenture, bearing date the 29th of *November* 1829, between *Edward Kent* and *Henry Kent*, of the first part, the plaintiffs, of the second part, *James D. B. Elphinstone*, of the third part, and the defendant of the fourth part, after reciting, amongst other things, a mortgage of the *Kingston Rectory* estate by *Edward Kent* and *Henry*

Kent to the plaintiffs for 25,242*l.* 17*s.* 6*d.*, with interest at 5 per cent., and a further mortgage of the equity of redemption of the same estate, by the said *Edward Kent* and *Henry Kent*, to *Elphinstone* for 9757*l.* 2*s.* 6*d.*, with interest at 5 per cent.; it was witnessed, that in consideration of the premises, and for further securing the payment of the interest of the said several mortgage sums of 25,242*l.* 17*s.* 6*d.* and 9757*l.* 2*s.* 6*d.* respectively, they the said *Edward Kent* and *Henry Kent*, with the approbation of the plaintiffs and the said *J. D. B. Elphinstone*, did make, ordain, constitute, and appoint the defendant receiver, agent, and attorney, from time to time, in the names or name of them the said *Edward Kent* and *Henry Kent*, or the survivor of them, their or his heirs or assigns, or of the defendant, his heirs or assigns, to ask, demand, collect, and receive the rents, profits, and proceeds of all and singular the hereditaments and premises comprised in the said two mortgages, and all the tithes thereby, or by either of the said mortgages, granted, of and from the then present and future tenants and occupiers thereof, or the persons liable to pay or render the same respectively, as and when the same should, from time to time, become payable or due; and in case of nonpayment thereof, or of any part thereof, to take and use such lawful remedies for recovering and obtaining payment of the said rents, issues and profits, and tithes, or any part thereof, by action, suit, distress, process, or otherwise, as should be necessary or expedient; and further to do, perform, and execute all other matters and things requisite for collecting and receiving the said rents, issues and profits, or proceeds, and tithes, as fully and effectually as they the said *Edward Kent* and *Henry Kent*, or the survivor of them, their or his heirs or assigns, could or might himself do, or might have done. And it was thereby agreed and declared between and by the same parties,

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that all and every the rents, profits, tithes, and proceeds which should be so received by the defendant as aforesaid, should be applied upon and for the trusts, intents, and purposes, thereinafter mentioned, that is to say, — upon trust that the defendant should, from time to time, out of the said rents, issues, tithes, and profits which he should receive by virtue of the said appointment, in the first place, pay all the costs, charges, and expenses which he, the defendant, should bear, sustain, incur, or be liable to, in or about the collecting, receiving, and compelling payment of, the said rents, issues, profits, tithes, and proceeds, or any of them, including therein all expenses of suit, action, process, and distress, and all other charges of management whatsoever; and should, in the next place, thereout pay all taxes, rates, assessments, and impositions taxed, charged, assessed, or imposed on the said hereditaments and premises, or any of them, or on the owners or occupiers thereof respectively, for or in respect of the same, as were payable by the landlord or landlords of the said premises, and as would have been payable by the said *Edward Kent*, his heirs or assigns, if the said two mortgages and that indenture had not been executed; and, in the next place, pay the interest for the first-mentioned mortgage sum of 25,242*l.* 17*s.* 6*d.* after the rate, and on or at the days or times in the first thereinbefore in part recited indenture mentioned and appointed for the payment of the same; and, in the next place, pay the interest for the said secondly mentioned mortgage sum of 9757*l.* 2*s.* 6*d.*; and, lastly, should pay to the said *Edward Kent* and *Henry Kent*, or the survivor of them, their or his heirs or assigns, or to such person or persons as the said *Edward Kent* and *Henry Kent*, or the survivor of them, their or his heirs or assigns, should order and direct, all the residue and surplus of the rents, issues, tithes, profits, and proceeds which should, from time to time,

remain after answering the purposes aforesaid, and deducting and detaining out of such residue and surplus, for his own use, so much and such sums of money as he should reasonably deserve, as a compensation for his care and pains, trouble and expense, in collecting, receiving, and paying the said rents, profits, tithes, and proceeds in manner, and for the purposes aforesaid, not exceeding 1*s.* in the pound on the gross amount of the said rents, profits, tithes, and proceeds for the time being received or collected. And the defendant did thereby for himself, his heirs, &c., covenant with the plaintiffs, their executors, &c., in manner following, that is to say, that he, the defendant, would, from time to time, and at all times, so long as he should be or continue the collector or receiver of the said rents, tithes, profits, and proceeds, or any of them, in manner aforesaid, use his uttermost endeavours faithfully to collect and receive the same; and that he, the defendant, would, during such time, and so long as he should continue to be collector, &c., truly and punctually pay or cause to be paid, in manner aforesaid, and to and for the ends, intents, and purposes aforesaid, all such sum and sums as should from time to time be collected and received by him, the defendant, under the power or authority; and also that he, the defendant, would, if he should so long live, and unless he should be removed from the said employment, in pursuance of the covenant in that behalf thereinbefore contained, continue to be collector and receiver of the rents, tithes, profits, and proceeds aforesaid, for the period of seven years from the day of the date of that indenture, and should not nor would, during the period aforesaid, refuse or neglect to proceed therein in manner aforesaid. And it was thereby further agreed and declared, that the defendant should not act under, or exercise, the powers or authorities thereinbefore contained, or any of them,

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until some one half-yearly payment of the interest on the first-mentioned sum of 25,242*l.* 17*s.* 6*d.*, or of the secondly-mentioned sum of 9757*l.* 2*s.* 6*d.*, or some part thereof respectively, should be in arrear and unpaid by the space of one calendar month next after any of the days or times on which the same respectively ought to be paid.

After the execution of this indenture, the interest on the first mentioned mortgage sum of 25,242*l.* 17*s.* 6*d.* for the half year ending on the 27th *November* 1830, was in arrear for more than one calendar month; and therefore the defendant, in *January* 1831, entered into the office of receiver, in pursuance of the indenture, having been applied to for that purpose by Messrs. *Clayton* and Co., the agents of the plaintiffs, on the 15th *December* 1830, to which application Mr. *Coverdale*, the partner of the defendant, answered as follows, by letter dated, sent, and received, on the 15th *December* 1830. "Be pleased to favour us with a copy of the deed of receivership, that we may see what its provisions are. We should indeed have the original, as it will probably be called for. Mr. *Dyneley* is, as you are aware, a mortgagee, exclusively of which, he is not, by reason of his distant residence, and his other avocations, the most desirable person for an active receiver of such a property as that which is the subject of your clients' mortgage. He will, of course, do his duty as well as he can; but if it were practicable, and we may imagine it is, it would be more advantageous to your clients, and to all parties interested, to have a receiver on the spot. We submit this to your consideration."

To this letter, Messrs. *Clayton* and Co. replied, by letter, as follows, on the 16th of *December* 1830.

"We send the draft of the receivership deed, and will let you have the original whenever it is required. We think Mr. *Dyneley* should immediately give the

Messrs. *Kent* notice, that he is now acting as receiver. We have requested Mr. *Lake* to furnish you with a rental, &c. Mr. *Dyneley* can, of course, —indeed must, of course, — employ some person to apply to the tenants and occupiers for payment; but we rather think, any appointment, by all the parties, of another receiver, will not be practicable."

The *Kingston Rectory* estate is an extensive estate, comprising the tithes of about 8000 acres of land, and 146 holdings, many of which are small. Some of the tithes were paid in kind. The defendant, being an attorney in practice in *London*, could not personally, having regard to his professional business, collect the rents, tithes, and other proceeds of the estate, or any of them, but, with the knowledge and approbation of Messrs. *Clayton* and Co., necessarily employed various persons, in succession, for that purpose; viz. Mr. *Carter*, Mr. *Briggs*, Mr. *Papps*, and, lastly, Mr. *Young*.

These parties were appointed by the defendant, who supplied them with notices, directing the tenants, tithe-payers, and others, to pay to these parties, successively, as the agents, for the time being, of the defendant, the receiver, the sums due to the estate. They actually received such sums, and rendered their accounts to the defendant, taking credit for their disbursements, as well in respect of tithe valuations, purchases of stock, repairs, and labourers' wages, in collecting and marketing tithes taken in kind, and other outlay incidental to the management of the estate, as in discharge of the poor-rates, land-tax, and other assessments, to which the estate was liable; all which disbursements have been allowed to the defendant in his accounts. They further deducted certain sums, —which are the sums now in dispute, —as their remuneration for collecting and receiving the payments due to the estate, and sending the balances

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to the defendant, who remitted them, from time to time, as he received them, to Messrs. *Clayton* and Co., together with their accounts and vouchers.

On the 3d of *January* 1831, *Clayton* wrote and sent the following letter to the defendant: —

"The bearer is Mr. *Briggs*, a brother in law of Mr. *Kent*, senior, and, I think, he may be a very fit person to be employed to collect the tithes, &c. in your name; but as he is not known to me, I have recommended him to see you, and give you some references to satisfy you as to his respectability."

Coverdale sent to *Clayton*, in *May* 1832, the account of *Briggs* for the preceding year, being the second year of *Briggs*'s agency; and the following letters passed between them: —

Dyneley and Co. to *Clayton*. 2d of *May* 1832. "We inclose a cheque for 306*l*., being the sum in our hands. Should the attempts to sell the land for building be successful, it will produce much more money, we think, than any other mode of disposing of the property. What is it that you are not altogether satisfied with in this respect? We send you *Briggs*'s accounts and vouchers for *January*, *February*, and *March* 1832, statement of arrears for 1830, as delivered by Mr. *H. Kent*, list of debts outstanding, accounts of proceeds of tithes taken in kind in 1831, statement of land let and rents received 1831, general statement of tithe for the year ending 25th of *March* 1832, and also *Briggs*'s general account. The general account is not balanced, because *Briggs*'s salary, &c. is not charged. We shall be happy to arrange his allowance with you."

Clayton and Co. to *Dyneley* and Co. 3d of *May* 1832. "We have to acknowledge the receipt of the accounts and your draft for 306*l*. The plan of selling for building will be attended with considerable expense and trouble, and may be very uncertain; but we are not

prepared to say it will not be the most advisable course of proceeding."

Dyneley and Co. to *Clayton* and Co. 10th of *May* 1832. "We requested *Briggs* to give us his own notions about his allowance; and, inclosed, you have his letter, upon which we shall be happy to have your opinion; in our opinion he asks too much."

Clayton and Co. to *Dyneley* and Co. 16th of *May* 1832. "We return *Briggs*'s letter on the subject of his remuneration for his services. As he is the agent for Mr. *Dyneley*, we apprehend you are the persons to be satisfied as to the proper amount to be allowed; and whatever you determine upon as being reasonable and proper under the circumstances, shall meet with our concurrence."

In the beginning of 1833 *Briggs* was failing in health; and the following correspondence passed between *Clayton* and Co. and *Dyneley* and Co., as to the appointment of a successor.

Clayton and Co. to *Dyneley* and Co. 14th of *February* 1833. "We think Mr. *Dyneley* should lose no time in appointing some person to act in the place of *Briggs*, who, we trust, will recover; but he is, at present, quite incapable of performing the duties of his office."

Coverdale to *Clayton*. 20th of *February* 1833. "Mr. *Dyneley* would prefer resigning the receivership at once, if it would not inconvenience you or your clients; if it would, he will appoint any other fit person you please as his agent. Mr. *Papps*, we should think, not calculated for such an office; but we will do as you please about him."

Reply same day. "We are sorry we cannot, consistently with our duty to our clients, relieve Mr. *Dyneley* from the trouble and responsibility of the receivership. If it had not been for his name, we should never have

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entered into the transaction, which has been a most mortifying one."

On the 25th of *February*, *Coverdale* communicated to *Clayton* the death of *Briggs*; whereupon the following letters passed between *Coverdale* and *Clayton*.

Coverdale to *Clayton*. 1st of *March* 1833. "Some person should, at all events, be authorised to get in the arrears. Do you wish to recommend any person in particular for this office?"

Clayton to *Coverdale*. 2d of *March* 1833. "We have no intention of recommending any person to act for Mr. *Dyneley* as his deputy in collecting tithes."

Clayton and Co. to *Dyneley* and Co. 15th of *March* 1833. "It is impossible that we can ask our clients, under the existing circumstances, to waive the stipulation that the interest shall be paid before the receiver receives any thing for his trouble. Any charge, therefore, of the deputy-receiver cannot be allowed as against the mortgagees for the present. We are very apprehensive that our clients are likely to lose a part of their principal."

Dyneley and Co. to *Clayton* and Co. 15th of *March* 1833. "We will get the arrears collected as fast as practicable. We think you are mistaken as to the allowance to Mr. *Dyneley*'s agent. Pray refer to the deed. If it be thought that he is to collect the tithes at his own expense, he had better retire from the office. We hope the case is not quite so bad as you anticipate."

Clayton and Co. to *Dyneley* and Co. 16th of *March* 1833. "It was expressly stipulated when we entered into this transaction that Mr. *Dyneley* should act as receiver for seven years, and that his salary or commission should be paid out of the rents and profits, but not until after our interest was paid. The nature of the property, and the difficulty of collection, rendered this a proper precaution on the part of our clients; and we ap-

prehend Mr. *Dyneley* cannot now say to us, 'I must be paid my salary as receiver before your clients receive their interest, or I will retire.' *Briggs* was the deputy of Mr. *Dyneley*; and it appears to us that our clients can have nothing to do with any arrangement made between him and Mr. *Dyneley*, as to compensation for his trouble. We believe you have the draft deed of appointment of a receiver. We have the original, which we will send you if you wish to see it. We have referred to it to ascertain that we were not mistaken in our recollection of its contents. As soon as the interest of our clients has been paid, then Mr. *Dyneley* will be entitled to his compensation out of the rents and profits."

Dyneley and Co. to *Clayton* and Co. 17th of *March* 1833. "We have the draft of the receivership deed, which we perused before writing to you, and satisfied our minds of the right of Mr. *Dyneley* to deduct the expenses of his agent, &c., out of the first moneys received. We are sorry to find you are of a different opinion. It would be a satisfaction to us if you would reconsider the matter, and let us hear again from you."

Clayton and Co. to *Dyneley* and Co. 18th of *March* 1833. "We still think that *Briggs*'s compensation for acting as deputy receiver ought not to be paid before the interest on the mortgages; but if you continue to think otherwise, the question had better be submitted to some barrister for decision."

On the 30th of *April* 1833, *Clayton* sent the following letter to Mr. *Young*: — "*Kingston* tithes. I have seen Mr. *Dyneley* and Mr. *Coverdale* this afternoon, and find them very much disposed to depute you to manage these tithes, and will thank you to let me know when you are likely to be in town, in order to arrange a meeting on the subject. I think you mentioned that you would undertake the business for 5 per cent.

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on the amount to be collected, and take all the trouble of making agreements with the occupiers."

On the 8th of *May* 1833, the following letters passed between *Clayton* and *Coverdale*: —

Clayton and Co. to *Dyneley* and Co. "It now becomes absolutely necessary to determine what is the true construction of the clause in the receivership deed, stipulating that the interest on the mortgages shall be paid before Mr. *Dyneley*, as receiver, deducts such sums of money as he shall reasonably deserve, as a compensation for his care and pains, trouble and expense, in collecting, receiving, and paying the rents, profits, tithes, and proceeds. Our clients are not in a situation to waive the stipulation; and it would be most unreasonable to expect them to do so, inasmuch as it was one of the express conditions on which the money was advanced." (*a*)

Dyneley and Co. to *Clayton* and Co. "We are so positive in our construction of the clause you refer to, that we cannot recede from the determination we have expressed with reference to it. We cannot help feeling somewhat surprised at your considering it at all doubtful."

On the 14th of *May*, *Clayton* wrote to *Coverdale* as follows: — "We have submitted the receivership deed to our Chancery draftsman, who has given the following opinion: 'Mr. *Dyneley* is, I apprehend, clearly not entitled to make the deduction of either Mr. *Briggs*'s salary or Mr. *Young*'s percentage, as against the mortgagees, until their arrears of interest have been paid.' We are very sorry for the necessity of discussing this point with Mr. *Dyneley*, but we are not in a situation to waive it; nor is there any ground for asking our clients to waive it. They advanced their money to Mr. *Dyneley*'s clients with an express stipulation (*a*), in which Mr. *Dyneley* thought it expedient to acquiesce."

(*a*) *Vide post*, 31. (*a*).

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On the 9th of *November* 1833, *Dyneley* and Co. wrote to *Clayton* the following letter: — "Herewith we send *Briggs*'s account and vouchers, *Papps*'s account and vouchers, and a copy of Mr. *Dyneley*'s account, shewing a balance of 70*l.* 15*s.*, for which we inclose a cheque. We have written to *Papps* for the small balance due from him. *Young*'s account is promised before the end of the year, when you shall have it."

On the 12th of *November* 1833, *Clayton* wrote to *Dyneley* and Co. the following letter in reply to their letter of the 9th: — "We are under the disagreeable necessity of objecting to two items in Mr. *Dyneley*'s receivership accounts, viz. 249*l.* 3*s.* 9*d.*, charged as paid to *Briggs*, the deputy-receiver, for his salary, and 23*l.* 18*s.* charged as paid to *Papps*, the temporary successor of *Briggs*. When we entered into this transaction, it was expressly stipulated by us, as a *sine quâ non*, that Mr. *Dyneley* should undertake the receivership, and that no salary or commission should be allowed to the receiver until after the interest on the mortgages should be fully paid; and, accordingly, the receivership deed, executed by Mr. *Dyneley*, was so framed. There is now due for the arrears of interest up to the 27th of *May* last 2010*l.* 12*s.* 11*d.* If you entertain any doubt upon the question, we believe our clients will be ready to submit to the decision of any counsel of eminence to be mutually agreed upon."

The proposed reference was declined by *Dyneley* and Co., by a letter dated the 22d of *November* 1833, but no reason was assigned; and on the 30th of *November* *Clayton* wrote as follows: — "We inclose a statement of account up to the 27th of this month, shewing a balance of 2962*l.* 13*s.* 1*d.* due for interest. We regret that you do not think the question as to the allowance of the deputy-receiver, one which might properly be referred to a barrister; and we have received directions

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to take steps to bring the matter to issue. It may be a hard case on Mr. *Dyneley*, and we are very sorry for it, but our clients cannot sacrifice their interests to his."

This discussion as to the right of the defendant to deduct from his balances the sums allowed to the several persons employed as aforesaid to collect the rents, tithes, and proceeds of the estate, as their remuneration for the actual receipt of the tithes, and other proceeds, was renewed at intervals in the ensuing two years, after which, the parties having failed to come to any understanding on the question between them, this action was brought to decide it.

The sums received by the defendant and his agents, from the period of his entering on his duty as receiver to the commencement of this action, amounted to 6606*l.* 4*s.* Of this sum he had paid over to the plaintiffs on account of their arrears of interest, 4879*l.* 10*s.* 6*d.*, and he had paid on account of the rates and taxes chargeable on the property, and of actual disbursements in collecting the proceeds and in management, that is to say, for rent for barns, &c., and men's wages in threshing out and selling such of the tithes as were taken in kind, 1278*l.* 18*s.* 4*d.*, leaving a balance in dispute of 447*l.* 15*s.* 2*d.*, which balance was composed as follows: —

	£	s.	d.
Allowance to Mr. *Carter*, an attorney, for serving notices, and for the applications for, and receiving, the proceeds of the estate, being a gross sum - -	9	13	10
Ditto to *Briggs*'s executors for ditto, an annual salary of 130*l.* claimed for managing, collecting, letting, &c. by their testator - - - -	249	3	4
Ditto to *Papps* for ditto, being at the rate of 5*l.* per cent. on the sums received -	23	18	0

	£	s.	d.
Allowance to *Young*, as per account annexed, at the same rate - - -	145	18	6
Allowance to him for his journeys to *Kingston* to make his collections - -	19	1	6

The proceeds of the estate have not, at any time since the defendant entered on the duties of the receivership, been adequate to meet the arrears of interest due to the plaintiffs.

The several sums in dispute form only a fair and reasonable compensation to the parties for their respective services; and the same rate of allowance as was received by *Young* has been continued to him since the defendant ceased to be receiver, for the same services as he performed whilst agent to the defendant, and for none others; the only difference being, that now the balances, vouchers, and accounts, are tendered directly to *Clayton*, instead of being passed immediately through the hands of the defendant; and as to this amount, such sums are proper to be allowed to the defendant, if he is entitled, under the provision of the receivership deed, to defray the same out of the rents, issues, tithes, and profits, of the estate, whilst the interest due to the plaintiffs remained in arrear.

The several persons so employed to collect the said rents, tithes, and proceeds, were, in each case, so employed on the introduction, and with the acquiescence, of *Clayton* and Co., and accounted with the defendant, and advised and corresponded with him, when any difficulties arose. Their several accounts and vouchers were delivered to, and examined and audited by him, and the money received by them was paid over by them to the defendant, and by the defendant to *Clayton* and Co. as the agents of the plaintiffs and on their account.

The defendant has not made any charge whatever, or

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received any remuneration, for his services in respect of the premises; and he was, at the time of his being called upon to act as aforesaid, in an infirm state of health, and unable to attend to his own private business as a solicitor.

If the court shall be of opinion that the defendant is not so entitled to deduct the said sums, the verdict is to stand; if to deduct some only, but not all, the verdict is to be reduced accordingly: and if the court shall be of opinion that he is entitled to deduct the whole of the said sums, a nonsuit is to be entered.

Bompas Serjt., for the plaintiffs, contended that the defendant having undertaken the office of receiver, was bound either to discharge the duties of the office in person or to pay those who performed the service in his aid.

Talfourd Serjt. adverted to the terms of the deed, and referred to *Davis* v. *Dendy* (*a*), where it was held by *Leach* V. C. that although a mortgagee cannot, in general, appoint a receiver, yet if the nature of the estate be such that much time and trouble must be sacrificed in the receipt of the rents, he may appoint a receiver. From the known position of the defendant, a *London* attorney, it could not have been contemplated that his should be the hand to collect the rents and tithes from upwards of 100 payers.

Bompas Serjt., in reply. In *Davis* v. *Dendy* it was held that extraordinary but necessary charges attending the receipt of the rents, ought to be borne by the mortgagor and not by the mortgagee, who would be entitled to recover the interest upon the money he

(*a*) 3 *Maddow*, 175.

had advanced without any deduction arising out of the particular nature of the estate. Here, it is not contended that the defendant may not charge his disbursements against the estate, that is, against the mortgagors; but it is submitted that neither from the nature of the security nor from the terms of the covenant, is the receiver entitled to make this deduction as against the mortgagees. (*a*)

TINDAL C. J. The first question in this case is, whether the court can see, upon the face of this deed, that the defendant was compellable to discharge the duties of receiver in his own person. Looking at the situation of the parties, it cannot have been contemplated that the defendant should undertake personally the office of receiver. The property consisted of 146 separate holdings, besides the tithes of land in the possession of different occupiers. The very nature of the property would require a person who should be constantly on the look out. The defendant was a person in business in *London*. It would be rather an extravagant construction of the terms of this deed, to suppose that the defendant should go almost every day in the year to *Kingston*, when the presence of a receiver might be required. The terms of the deed are upon trust "that the said *John Dyneley* do and shall, from time to time, out of the said rents, &c. which he shall receive by virtue of these presents, in the first place, pay all the costs,

(*a*) *Quære*, whether the two clauses may not be reconciled by considering that the receiver was to be entitled to deduct the expense of collecting in the first instance, as a charge prior to the interest reserved by the original mortgage deed, but that, when the receiver claimed his remuneration from the mortgagors, by way of deduction out of the surplus, such remuneration, *including the expense of collecting*,—which had already fallen upon the mortgagors, by causing so much of their debt to remain unpaid,—should not exceed 5 per cent.

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charges, and expenses which he the said *John Dyneley* shall bear, sustain, incur, or be liable to, in or about collecting, receiving, and compelling payment of the said rents, &c., including therein all expenses of suit, action, process, distress, and all other charges of management whatsoever." Suppose, for a moment, that this clause had stood alone. I cannot help thinking that charges made for the services of *Briggs* and *Papps* would be charges and expenses which the defendant bore, sustained, incurred, or was liable to in or about the collecting, receiving, and compelling payment of the rents, &c. If the defendant was not personally to occupy himself in collecting these rents and tithes, if he was not bound to perform the duties of receiver himself, it cannot be doubted that this was a sum which ought to be allowed. Then comes the clause upon which the difficulty is supposed to arise. After the clause respecting costs, charges, and expenses, and after providing for the payment of taxes, &c., and for the payment of the interest to the mortgagees, and for the payment of the surplus to the mortgagors, the defendant engages to pay to the mortgagors all the rents, &c., which shall from time to time remain after answering the purposes aforesaid, and deducting and detaining out of such surplus for his own use so much money as he shall reasonably deserve as a compensation for his care and pains, trouble and expense, in collecting, receiving, and paying the said rents, &c., in manner and for the purposes aforesaid, not exceeding 1*s.* in the pound on the gross amount of the said rents, &c., for the time being received or collected. Upon the first reading of this last clause it might be supposed that the reimbursement to the defendant of expenses incurred by him in collecting, receiving, and paying over the rents and tithes, was to be postponed to the payment of the interest due to the mortgagees. But the first series of

directions relates to the application of the proceeds of the mortgaged premises, as between the receiver and the mortgagees, who are not to receive any thing on account of interest until those charges are defrayed which the mortgagees in possession, like any other owners of the property, must have borne before any part of these proceeds would be applicable to their own use. Then follows the clause directing the application of the surplus; which clause appears to be the result of a bargain, — that as between the receiver and the mortgagors, the former should be entitled to remuneration for his services out of that surplus, though, for the preservation of the rights of the mortgagees (*a*), it is stipulated that the remuneration shall not exceed 5 per cent., and that it should be paid out of the surplus remaining after paying the interest. He is not to make any claim for remuneration until the interest is paid. Taking these clauses together, it appears to me that the intention of the parties was, that the defendant should be reimbursed his expenses out of the first proceeds, but that he should not draw any profit from the transaction until after the mortgagees were satisfied to the extent of the interest. The defendant was not to make a good thing of it till the objects of the trust were accomplished. An apparent ambiguity is caused by the use of the word "expense," which occurs in both clauses; but it appears to me that the word was introduced into each clause with a totally different meaning, and that the defendant is entitled to retain the whole of the costs charged by him. I am therefore of opinion that there should be an entry of a nonsuit.

COLTMAN J. The case is not free from difficulty in consequence of the insufficient mode in which the parties

(*a*) And, ultimately, of the mortgagors.

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have expressed the terms of the defendant's engagement. I cannot however entertain a doubt, but that it was fully understood that the defendant was not to go round and collect the debts personally; and if so, it must have been also understood, that some other person should be employed and paid to perform that duty. The only sums charged in this account against the mortgagees are the costs actually and reasonably incurred by the defendant in executing the trusts of the deed. These are costs which the mortgagees must have incurred, if the defendant had not been appointed receiver. Therefore, by having these charges cast upon them, the mortgagees are not placed in a worse situation than other mortgagees who could not be supposed to collect tithes themselves, and go to market with the produce.

Whether the defendant might be entitled to maintain these charges against the mortgagors, would depend upon whether such charges did or did not fall within the rule laid down in *Davis* v. *Dendy*. (*a*) I see no great hardship in the clause authorising the defendant to charge so much as he should reasonably deserve, not exceeding 1*s*. in the pound. It is what the mortgagors bargained to pay; and it is what they would in all probability have been obliged to pay to some agent, if these small holdings and tithes had never been mortgaged.

ERSKINE J. I am of the same opinion. The court is called upon to put a construction on a deed entered into between mortgagors, and mortgagees, and a person appointed by both parties to be their receiver. The object of all parties was, in the first instance, that the utmost should be collected from the mortgaged property. The payment of the principal formed no part of the arrangement to which this deed was to give effect,

(*a*) 3 *Maddox*, 175.

on the contrary, the surplus rents, &c., instead of being applied in reduction of the principal, were to be paid over to the mortgagors. It was the interest both of the mortgagors and the mortgagees that the utmost should be collected. If the mortgagees had taken actual possion they must have employed and paid persons to collect in the same manner as *Briggs*, *Papps*, and *Young* were employed and paid. Knowing this, the parties appear to have agreed that the expense of collecting should be a prior charge to the payment of the interest. (a) The defendant takes the office with this view — the costs, charges, and expenses are to be first deducted. That clause satisfies me, that the parties contemplated the employment of agents. It cannot, and has not been attempted to be denied, that if the deed had stopped there, the sums claimed to be deducted on the part of the defendant would have been clearly a proper subject of deduction. But it is contended that, because the defendant is, by a subsequent clause, to deduct from the surplus rents, a remuneration for his care and pains, trouble and *expense* in collecting, &c., — and the payment of the expense of collecting is thus postponed to the payment of the interest to the mortgagees, — the defendant is not entitled to retain the amount of such expense as against the mortgagees. If it had appeared that the defendant was to do the work himself, the argument might have been a sound one.

Though the defendant might well consent to act as middle-man, without any remuneration for his services unless there were a surplus, after paying the interest, it would be unreasonable to suppose that it was meant

(a) The whole of the mortgage money had been advanced before the arrangement carried into effect by the deed was completed. A collection of the rents gratuitouly, as far as the mortgagees were concerned, could not, therefore, as suggested, *antè*, 22., have formed part of the consideration for the loan by the plaintiffs, or by them and *Elphinstone*.

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that for money actually and necessarily expended in this service, his reimbursement should depend upon the contingency of there being such a surplus. It appears to me, therefore, that the defendant is entitled, under the first clause, to the deduction which he claims.

MAULE J. I also am of opinion that the defendant is entitled to judgment in his favour. It appears to have been considered that the profits of the estate could not be got in without considerable expense. The parties must, however, have had in view, not only the state of the property, but also the situation of the agent appointed by them to receive the profits, — a person known to be incapable of collecting them in person. Can it, under these circumstances, be said, that the sums now sought to be deducted were not expenses incurred in the collecting, receiving, and compelling payment of the rents and tithes? The second clause applies to the salary to be received by the defendant. This was to be in addition to the payments he would have to make to other persons (*a*), those payments being already provided for in the first instance. As against the mortgagees, nothing more than the necessary expenses of management were to be allowed; but if the receipts left a surplus after paying those expenses and after keeping down the interest, the defendant, as against the mortgagors to whom that surplus would be to be paid over, was to be allowed to deduct a reasonable compensation for his trouble, not exceeding 5 per cent. In this view of the case the two clauses are perfectly consistent.

Rule absolute to enter a nonsuit.

The defendant having died pending the rule, *Talfourd* Serjt. obtained a rule nisi, for leave to enter up

(*a*) *Antè*, 27. (*a*).

judgment of nonsuit as of *Hilary* term 1839, when the defendant was alive. No cause being shewn against the latter rule, it was made absolute.

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ASSUMPSIT. The declaration stated that on the 23d of *December* 1839, the plaintiff caused to be put up for sale, by public auction, a certain leasehold house and shop, and certain fixtures thereto belonging, subject to the following, amongst other, conditions of sale; that is to say—that the highest bidder should be the purchaser—that the purchaser should pay down immediately into the hands of the auctioneer, a deposit of 25 per cent. in part of the purchase money, and sign an agreement to pay the remainder, with the amount of the valuation of the fixtures, within twenty-one days from the day of the sale, — and that if the purchase should, from any cause, not be completed by the day above stated, the purchaser should pay interest, from that time, at the rate of 5 per cent. per annum, on the remainder of the purchase money, until such purchase should be completed, — that an abstract of the vendor's title should be delivered to the purchaser, at the vendor's expense, but that all attested copies, and covenants for production of deeds, should be procured, and paid for, by the person requiring the same, — that upon payment of the remainder of the purchase money, according to the condition in that behalf made, the vendor would execute an assignment of the premises to the purchaser at the purchaser's expense; but that the vendor would not engage, or be compellable, to shew the lessor's title under which he held the premises; that if the purchaser should fail

An allegation, that *A.* delivered an abstract of his title to *B.*, is not satisfied by proof, that *A.* handed two deeds, which formed the whole of his title to *B.*, and that *B.*, having read the deeds, returned them to *A.*

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to comply with the said conditions, the deposit money should be forfeited and become the property of the vendor, and the vendor should be at full liberty to resell the property by public or private sale, without the necessity of previously tendering an assignment to the purchaser, and the deficiency, if any, by such resale, together with all expenses attending the same, should be made good to the vendor by the defaulter at the then present sale. Averment: that the defendant upon &c. was the highest bidder for, and declared to be the purchaser of, the premises, for the sum of 25*l.*, subject &c. Mutual promises. Averment: that the defendant paid a deposit, and signed an agreement to pay the remainder and complete the purchase according to the said conditions; that, although the plaintiff after the making of the said promise and agreement, and before the expiration of the twenty-one days in the conditions mentioned, to wit, on the day and year aforesaid, *did deliver to the defendant an abstract of his, the plaintiff's, title to the said tenements*, and although he, the plaintiff, then had, and did shew, and make appear to the defendant, and to his satisfaction, that he, the plaintiff, had good and sufficient title to sell and assign the said premises in manner aforesaid, and although he, the plaintiff, was then ready and willing to complete the said sale, and perform all the conditions thereof on his part, and then, to wit, on the day and year aforesaid, offered to the defendant to complete the said sale as aforesaid, and required the defendant to perform the said conditions on his part; nevertheless, the defendant did not, nor would, within twenty-one days from the date of the said sale, or at any other time, pay the remainder of the said purchase money, or any part thereof, or complete the said purchase, or perform the said conditions of sale on his, the defendant's, part; but then wholly neglected and failed to comply with the said conditions, and to per-

form his said promise and agreement, and therein made default; and further, that the said fixtures, at the time of the said sale to the defendant, were and are of great value, to wit 60*l.* That afterwards, and after the said space of twenty-one days in the conditions mentioned, and after the said refusal of the defendant to complete the said purchase, to wit, on the 27th of *February* 1840, according to, and by virtue of, the said conditions of sale, the plaintiff resold the said tenements and the said fixtures, and, at such resale, the plaintiff obtained a much less price or sum for the same than the amount for which the same had been sold to the defendant as aforesaid, and the said value of the said fixtures, that is to say, the price or sum of 35*l.*; whereby there then was a deficiency upon such resale to a large amount, to wit 50*l.*, and the expenses attending such resale then amounted to a large sum, to wit 10*l.*; of all which the defendant then had notice; and by reason of the premises, and according to the said conditions of sale, he, the defendant, then became liable to pay, and ought to have paid, to the plaintiff, the said several sums of 50*l.* and 10*l.*; yet the defendant had not, although he was then requested so to do, as yet paid the said sums of 50*l.* and 10*l.* or any part thereof, but so to do he had hitherto wholly refused and still refused; and also, by means of the premises, the plaintiff not only lost and was deprived of the use and advantage of the said tenements from the time of the sale thereof to the defendant as aforesaid to the time of the resale thereof; but was also obliged to pay, and did then necessarily pay a large sum of money, to wit 12*l.* 5*s.*, for the rent of the said tenements during that time; and was otherwise injured, &c.

Pleas: first, non assumpsit; secondly, that the plaintiff did not, before the expiration of the period of twenty-one days, in the conditions and in the declaration mentioned,

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deliver to the defendant an abstract of the plaintiff's title to the tenements in the declaration mentioned. The plaintiff joined issue upon both pleas.

At the trial before Lord *Abinger* C. B., at the last *Guildford* assizes, the plaintiff, after establishing the affirmative of the first issue, proved that on the day after the sale, the lease with an assignment to the plaintiff indorsed thereon, was, by direction of the plaintiff, handed by *Thomas*, the auctioneer, to and read by the defendant. *Thomas* then asked the defendant, what solicitor he should send the abstract to; upon which the defendant said, "There is plenty of time: let it be for the present;" and returned the lease to *Thomas*. He then requested *Thomas* to allow him to look at the fixtures; which he was permitted to do. He expressed himself satisfied, and told the parties then in possession, that he was their landlord, and that they were to pay their rent to him. *Thomas*, at the request of the defendant, put a bill in the window, and tried to procure a tenant for the house. In *January* the defendant declined to complete the purchase. He told *Thomas* that it was a very bad job, and desired him to do the best he could for him, the defendant. The premises were resold by private contract, leaving a deficiency of 53*l.* 8*s.*, which this action was brought to recover.

It was objected, by *Platt*, for the defendant, that the declaration contained a specific allegation that an abstract *had been delivered;* which allegation was put in issue by the plea, and had not been proved. He therefore contended that the plaintiff ought to be nonsuited. *Thomas* being recalled, stated that the lease was not in court; that he should have allowed the defendant, upon giving a receipt for it, to take away the lease, but that he did not tell the defendant so. Lord *Abinger* C. B. overruled the objection, giving leave to move to enter a nonsuit. A verdict was returned for the plaintiff, damages 40*l.*

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Wilde Solicitor-General, in *Michaelmas* term 1840, moved for a rule to set aside the verdict, and, pursuant to the leave reserved, to enter a verdict for the defendant, or for a new trial, on the ground of misdirection; *Stowell* v. *Robinson*. (*a*) A direct issue is taken by the plea, upon the delivery of the abstract alleged in the declaration, and the evidence clearly shewed that no such delivery had taken place. [*Maule* J. The averment in the declaration is, not that the act was waived, but that it was done.] A rule nisi being granted,

Channell Serjt. now shewed cause. The fourth condition is that on which the court will have to decide: by that condition an abstract of the vendor's title is to be delivered to the purchaser at the vendor's expense; but all attested copies and covenants for production of deeds, are to be procured and paid for by the person requiring the same. It will, however, be material to look at the fifth condition, which states, that the vendor will not engage, or be compellable, to shew the lessor's title under which he holds the premises. The question is, what meaning is to be given to the word "abstract" in these conditions of sale. The term is not to be understood in its literal sense. If a copy of the lease had been delivered, that would have been a sufficient compliance with the condition. If a copy would do, the original would be sufficient, especially where the parties had agreed so to treat it; and that it was so agreed, may be inferred from the circumstance of the defendant's applying to the auctioneer to let the house, and from his ordering the tenants to pay rent to him. The auctioneer, with the defendant's sanction, puts a bill in the window, and tries to procure a tenant. As the lessor's title was not to be inquired into, the whole of the vendor's title, of which an abstract was to be given,

(*a*) *3 New Cases*, 928., *5 Scott*, 196.

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consisted of the lease, with the assignment indorsed, which was handed over to the defendant. It was competent to the parties to treat such a delivery as the delivery of an abstract of the lease and assignment. The case is not put upon the footing of a waiver, a defence which would have formed the subject of a special plea.

Shee Serjt., in support of the rule. A distinct issue is raised, the affirmative of which the plaintiff was bound to establish. [*Maule* J. The words at the close of the original conditions appear to have been introduced merely to qualify the title.] If the plaintiff relied upon a waiver of the condition, he was bound to declare accordingly. In *Jones* v. *Barkley* (*a*) the defendant engaged to pay on the plaintiff's assigning an equity of redemption. The declaration for non-payment, after admitting non-performance of the condition, averred that the plaintiffs offered to assign, but that the defendant discharged them from assigning. The same course should have been taken here.

TINDAL C. J. Upon the second plea a precise issue is raised and taken. The allegation traversed by that plea is, that the plaintiff did, before the expiration of the twenty-one days, deliver to the defendant an abstract of the plaintiff's title to the said tenements. I do not think there was any evidence that an abstract had been delivered. The delivery of the lease does not satisfy that allegation. It is evident that it was not so understood by the parties. After that had taken place which is now put forward as an agreement that the delivery of the lease should be treated as the delivery of an abstract, the auctioneer asked the defendant, — to whom he wished the abstract to be sent. No case has been produced

(*a*) 2 *Dougl.* 684. And see *Goss* v. *Lord Nugent*, 5 *B.* & *Ad.* 58.; 2 *N.* & *M.* 28.

in which it has been held, that the delivery of title deeds is equivalent to the delivery of an abstract of those deeds. I think the rule should be made absolute, to the extent of granting a new trial.

COLTMAN J. concurred.

ERSKINE J. The evidence does not shew that a delivery of the lease was accepted by the purchaser as a delivery of an abstract. The exhibition of the lease amounted to nothing. The delivery of the lease would not have answered the same purpose as the delivery of an abstract.

MAULE J. There was no evidence that an abstract had been delivered. The subsequent conversation shews what was meant when the lease was handed over. Supposing that, under the issue taken by this plea, the plaintiff might give evidence of an assent to treat the lease as an abstract, or to accept the lease instead of an abstract, I think that no evidence was given from which such an assent could be inferred. The defendant was allowed to look at the lease; but he was expressly asked, — to whom the abstract was to be sent. I am also of opinion, that if the condition, under which the purchase was made, was afterwards dispensed with, such dispensation should have been alleged in the declaration.

Channell Serjt. prayed leave to amend.

COLTMAN J. Whether an amendment will avail the plaintiff, appears to be very doubtful.

The following rule was drawn up. "That the verdict found for the plaintiff on the trial of this cause be set aside, and that, instead thereof, a nonsuit be entered,

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unless the plaintiff shall, within ten days, elect to amend his pleading in this cause, in which case the plaintiff shall be at liberty so to do, and a new trial shall be had between the parties, on payment, by the plaintiff to the defendant or his attorney, of his costs of and occasioned by such trial already had, together with his costs of and occasioned by such amendment, and of his application to the court; to be respectively taxed," &c.

May 25. LOTT and PIDGEON, Assignees of SMARK, a Bankrupt (*a*), *v.* MELVILLE, SHARPE, and TODD.

Feigned issue, on an allegation, that, at the time of the seizing of certain goods in execution, the plaintiffs in the issue were entitled to the same, as against and free from the execution, and that the goods were not liable to be so seized as against such plaintiffs. Held, that the plaintiffs, who claimed as assignees under the bankruptcy of the judgment debtor, were bound to prove the trading, petitioning creditor's debt, and act of bankruptcy, though no notice had been given to dispute those matters, under the 6 *G.* 4. *c.* 16. *s.* 90.

FEIGNED issue, under the sixth section of the interpleader act of 1 & 2 *W.* 4. *c.* 58. The declaration stated, that on the 23d of *May* 1840, certain cattle, goods, and chattels were seized by the sheriff of *Devon* under a fi. fa. issued against *Smark*, indorsed to levy 749*l.* 9*s.* 6½*d.* with interest at 4 per cent. from the 1st of *April* 1840. After a colloquium and wager as to whether the cattle, &c. were subject and liable to be so seized, the allegation upon which the issue was taken

Held also, that an attorney does not become a scrivener, liable to be made a bankrupt under 6 *G.* 4. *c.* 16. *s.* 2., by lending the money of clients and charging a procuration fee to the borrowers.

Held also, that a transaction in which an attorney calls in and receives the money of a client, and retains the money in his possession, paying interest to that client upon the amount, is not a trading as a money scrivener.

(*a*) Though the plaintiffs were inadvertently described as assignees in the title of the cause, they were not so designated in the body of the issue. *Vide post*, 45.

was — that at the time of the seizing, &c. the plaintiffs were entitled to the same as against, and free from, the said execution; and that the said cattle, &c. were not subject, or liable, to be so seized or levied under the said writ, as against the plaintiffs.

At the trial before *Coleridge* J. at the last *Bristol* assizes, it was contended, on the part of the defendants, that no trading and no act of bankruptcy had been proved. The jury found an act of bankruptcy. The trading attempted to be set up was, that *Smark* who was an attorney, had had dealings as a money scrivener. *Pippen*, who had been clerk to *Smark* for the last four years, spoke to a variety of instances of money being procured by *Smark* for clients, who were charged a procuration fee of 5*s.* per cent. He proved that a Miss *Torrens* had employed *Smark* to invest 700*l.* for her; and that *Smark* had been applied to by one *Squire* to procure him a sum on mortgage; that the mortgage securities had been prepared; and that Miss *Torrens* had authorised a debtor of hers to pay to *Smark* the 700*l.* for the purpose of being paid over to *Squire*, which was done accordingly; *Squire*, in addition to the costs of the securities, paying *Smark* 5*s.* per cent. procuration money.

It was objected, by *Bompas* Serjt. for the defendants, that the plaintiffs were bound to produce *Smark's* bill of costs, in which these charges were entered; but the objection was overruled by the learned judge.

Pippen also proved that *Smark* had called in 140*l.* due to a Miss *Grigg* from a Miss *Hook*. This 140*l.* remained in *Smark's* hands down to the time of his bankruptcy, and formed the petitioning creditor's debt. Interest had been from time to time paid by *Smark* to Miss *Grigg* upon the sum of 140*l.*, and he had told *Pippen* that it was her money. The jury found that the sum had been *lent* by Miss *Grigg* to *Smark*.

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No witness was called for the defendants; but it was insisted, amongst other things, that no trading had been proved. *Adams* v. *Malkin* (*a*) was referred to. The learned judge told the jury that the trading must be habitual, and that a single act was not sufficient to make the party a trader; and he directed their attention to the description of a money scrivener in the statute. (*b*) The jury having found all other points left to them in favour of the plaintiffs, the learned judge directed the verdict to be entered for the plaintiffs, reserving leave to the defendants to move to enter a verdict for them, upon these grounds — that the transactions of *Smark*, did not amount to a dealing as a scrivener, and that the loan transactions, negotiated by *Smark*, had not been sufficiently proved.

In the following *Michaelmas* term *Bompas* Serjt. moved accordingly. The law with respect to the conducting of the business of a scrivener, so as to bring the party within the operation of the bankrupt laws, is fully examined by *Gibbs* C. J. in *Adams* v. *Malkin*, who says (*c*), "The person to be considered to be a scrivener, within the meaning of the statute, must likewise, in the course of this occupation, receive other men's moneys into his trust or custody. It appears from the old cases, that before bankers and brokers were so easy to be found, the scrivener was the person with whom people were accustomed to deposit their money, in order that he might lay it out for them when he should find a proper opportunity. The scrivener, in the meantime, had the use of it, and could not be questioned for the profit he made of it, till he laid it out. He was trusted as a banker. It was not a specific sum which, in moneys numbered,

(*a*) 3 *Campb.* 534. The whole of the trial was published in a separate form by *P. Hurd.*

(*b*) 6 *G.* 4. *c.* 16. *s.* 2. *post.* 52.

(*c*) 3 *Campb.* 538.

he was to keep in his chest: he gave credit for it to the party who had sufficient confidence in him that he would lay it out to advantage as soon as an opportunity offered. It was seen to be of great importance that this description of persons should be subject to the bankrupt laws; for, through them, the property of others was exposed to the risks of trade. They were trusted with other men's property, as traders now are; and, therefore, it was of consequence to the public, that, if any calamity happened to them, there should be the same summary means, which had been before devised with respect to other persons in trade, of getting at their effects and making an equal distribution among all their creditors." — "In order to make a man a money scrivener, he must carry on *the business* of being trusted with other people's moneys to lay out for them as occasion offers. It is not being sent with the money of his client, or receiving it from the person with whom his client may have previously contracted, that will make an attorney a money scrivener. In that part of the transaction he is no more than a person employed to fetch and carry. Having negotiated the loan, and drawn the deeds, his happening to receive and pay the money is incidental to his business as an attorney. Nor, if, on one or two occasions, money were deposited with him to lay out, would that constitute him a money scrivener. He must be carrying on the *general business* of a money scrivener. That must be a *part of his known occupation.* I cannot express what I mean to convey more correctly than in the words of the present Lord Chancellor (*a*) in a case before him (*b*): 'The next question is, as to the trading as a scrivener. That does not depend upon the fact, whether the bankrupt has or has

(*a*) Lord *Eldon.*

(*b*) *Paterson, ex parte,* 1 *Rose,* 402. 404.

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not, occasionally, done acts which a scrivener, peculiarly and properly, would have done: not upon what he may have done upon one day, and what upon another day; but upon his *intention* generally to get a living by so doing.' Though an attorney may have incidentally acted as a scrivener, that is not sufficient: though money may have been deposited with him, for which he was afterwards to seek a borrower, a few insulated instances of this sort occurring in the course of his business as an attorney, would not bring him within the operation of the bankrupt laws; for that would not be 'using the trade or profession of a scrivener, receiving other men's moneys or estates into his trust or custody.' The substantial question is, whether generally, as a mode of getting his living, money is committed to the hands of the party to lay out." [*Bosanquet* J. Does it appear that the party ever had the opportunity of misapplying the money? (*a*)]

The deeds by which the loans negotiated by *Smark* were effected, and his bills of costs charging procuration fees, should have been produced at the trial. A rule *nisi* having been granted,

Manning Serjt. (with whom was *Elliott*) now shewed cause. The question as to the sufficiency of the trading does not properly arise in this case. The object of the learned judge in directing the issue was, to inform the conscience of the court whether the execution creditor had notice of the bankruptcy. No question was intended to be raised as to the validity of the fiat. The court will take judicial notice of the object for which an issue is directed by them. [*Tindal* C. J. The question intended to be tried was, whether or not the defendant had notice of an act of bankruptcy at the time of the

(*a*) See *post*, 50.

seizure. Then the terms of the issue being general, whether the plaintiffs were entitled to the goods, they cannot maintain the affirmative of that issue if *Smark* was not liable to be made a bankrupt. *Erskine* J. The issue is in the common form. The parties claiming the goods sue as plaintiffs; and as they claim under *Smark*, as his assignees, they must make out their title as assignees.] The defendants were bound to prove that they had given notice to dispute the trading under the 6 *G.* 4. *c.* 16. *s.* 90., which enacts that in any action by or against any assignee no proof shall be required at the trial of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee that he intends to dispute some, and which of such matters. [*Maule* J. This is an action on a wager. The plaintiffs do not sue in the character of assignees; they sue as persons who have laid a wager.] The action is brought by parties who are appointed assignees, and in respect of property claimed by them as assignees; and the case falls clearly within the principle of the ninetieth section. [*Tindal* C. J. The notice required by that section is to be given, at or before pleading, by a defendant, or at or before issue joined, by a plaintiff; but in the case of a feigned issue no such stages in the proceedings occur. The whole issue is framed *uno flatu.*] It is true that in practice the issue is drawn by the plaintiff and approved, *as one entire thing*, by the defendant; but that is mere matter of convenience, like the adding of the *similiter*, by the party who takes issue, for the purpose of saving time. In the case of a feigned issue, the defendant, in substance and in truth, *pleads* when he returns the issue settled and approved. The plaintiff, on delivering the issue, must be taken to say, "Thus I declare; and thus should you plead." By returning

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the issue settled or approved, the defendant in effect says, "So do I plead." Under the 1 & 2 *W.* 4. *c.* 58. *s.* 1., defendants, in actions of assumpsit, debt, detinue, or trover, are allowed to disclaim all interest in the matter in dispute, and to call upon any party claiming, to apply to the court, after declaration, or a judge, to make the claimant a party to the action depending, or to some other action,—that is, some other action founded on the circumstances of the case,—or to direct a feigned issue between the adverse claimants. No reason can be assigned why the assignees should be protected in the original action, or in a new action to which the circumstances of the case may give rise, and not in another action, founded upon a supposed collateral wager, directed for the determination of the same question. Avowries are not mentioned; yet no one will contend that in actions of replevin brought by assignees, they are to be deprived of that protection to which they would have been entitled in trespass, detinue, or trover. The legislature uses language adapted *ad ea quæ sæpius accidunt;* and even where it enumerates particular cases, to which the provisions are declared to apply, as in the statute *de donis*, other cases, in like mischief, are considered as not excluded. It has often been held, that feigned issues are to be treated in the same way as other actions upon promises; *Rex* v. *Phillips* (*a*); *Herbert* v. *Williamson* (*b*); *Earl Fitzwilliam* v. *Maxwell.* (*c*) Those were cases upon the statutes which give costs; but there seems to be no reason why they should not also come within the protection afforded by the 6 *G.* 4. *c.* 16. *s.* 90. This case is within both the spirit and the letter of that enactment. The evil intended to be remedied was, the necessity

(*a*) 1 *Wils.* 261.
(*b*) *Ibid.* 324.
(*c*) 7 *Taunt.* 31.

which parties were formerly under of proving facts respecting which there was, or ought to have been, no dispute. If the learned judge who directed the issue had been informed that the bankruptcy was meant to be contested, he would, no doubt, have directed the insertion of a count for the purpose of raising a distinct issue upon the fact of bankruptcy; *Woolcot* v. *Leicester* (*a*), *Yeo* v. *Allen*. (*b*) It does not follow because a party denies his adversary's title, that he is desirous that the expense should be incurred of proving parts of that title respecting which no dispute has arisen, and no doubt exists. The generality of the language of the issue gave the defendants, at most, the *option* of disputing the requisites of the bankruptcy, if, at the proper stage of the cause, they deemed it expedient so to do. And this opinion appears to have been entertained by the defendants themselves. Notice to dispute was, in fact, given, though given too late. In consequence of the notice, however, the plaintiffs did, as far as they were able, procure evidence of the trading, the act of bankruptcy, and the petitioning creditor's debt.

But supposing this point to be open to the defendants, it is submitted that the evidence established a trading as a scrivener. Although an attorney with whom money may have been deposited, for which he is to seek a borrower, is not necessarily a money-scrivener, the question on this, as in all other cases of trading, is, whether the party acts with a *general intention* of gaining his living, or part of his living, by such trading. The intention must be manifested by some overt act, but if the overt act be clear, one act is as good as fifty. The selling of a pound of tea on four or five occasions, may be doubtful evidence of an intention to seek a living by tea-dealing; but if a man

(*a*) 6 *Taunt.* 71. (*b*) *Tidd. Prac.* 9th ed. 212.

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buy a chest of tea, and opens a shop as a tea-dealer, he is a person seeking his living by buying and selling, before he has found a customer for a single ounce.

The decision in *Adams* v. *Malkin*, with reference to the facts in that case, is not questioned. It would, however, be unreasonable to expect, in an opinion delivered at nisi prius, that the language used should be adapted to any possible state of facts which may arise, how much soever it may differ from that to which the attention of the judge has been drawn. The same judge who, in *Adams* v. *Malkin*, thought that *two or three* instances of trading would be insufficient, held, in *Newland* v. *Bell* (*a*) that a person who buys and kills more pigs than are required for his own consumption, with a view to profit from a resale is a trader; and that *one* instance of buying and selling is sufficient. The intention to trade, once manifested, is presumed to continue; *Heanny* v. *Birch*. (*b*) Nothing appeared from which it could be inferred that the bankrupt was to *receive* Miss *Grigg*'s money in the capacity of a borrower, or that he did so receive it. He took it into his custody, as a scrivener would do, — as her agent, and subject to her disposal. After it had been in his hands *some time*, he paid her interest; from which the jury inferred that the money was suffered to *remain* on loan. But even if the transaction had appeared to have been *converted* into a loan on the very day the money was received, — a supposition evidently at variance with the fact, — it would still have been her money "*received* into his trust or custody (*c*)," so as clearly to bring the case within the 6 *G.* 4.

(*a*) *Holt, N. P. C.* 221. And see *Gale* v. *Halfknight*, 3 *Stark. N. P. C.* 57.

(*b*) 3 *Campb.* 233., transcribed, 1 *Rose*, 356.

(*c*) Even where the trader is a banker, it may be said that every payment made by a customer is, strictly speaking, a *loan* to the banker by the customer. See *Stone* v. *Marsh*, 6 *B. & C.* 551., 9 *D. & R.* 643.

c. 16. s. 2. which enacts that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's moneys or estates into their trust or custody, and persons insuring ships, shall be deemed traders liable to become bankrupt.

It is true that this was the only instance, distinctly proved, of a seeking to gain a living by this mode of dealing; but the surrounding circumstances shew that the act was done by *Smark* in pursuance of a formed intention so to *seek* his living. It was done *animo repetendi*. The surrounding circumstances were, that *Smark* was in the habit of negotiating loans and charging procuration money; a charge originating with, and formerly peculiar to, money scriveners, though now made by attorneys, where the advance is *procured* by them. No jury could have hesitated to find that *Smark* received Miss *Grigg*'s money as part of a system of loan agency, or to say that it formed part of the business for which *he held himself out*, to receive the money of his clients from the parties who had borrowed it, into his trust and custody, for the purpose of paying it over to the former, or of investing it on new securities, as they should direct. Whether other clients would have had sufficient confidence in *Smark* to authorise him to take their money into his custody, is a matter irrelevant to the existence of an intention on his part, to deal generally as a money scrivener, at the time he received Miss *Grigg*'s money into his "trust or custody," though the absence of such confidence may account for that paucity of evidence with which the plaintiffs had to contend.

The defendants claim under *Smark*, — whether by conveyance from him or by execution against him, is immaterial. Miss *Grigg* is the petitioning creditor, and she may be the only creditor who can prove against the estate. *Smark* received her 140*l.* into his trust and custody; and so far was he from being, as was supposed

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when this rule was granted (*a*), without the means of misappropriation, that he did actually misappropriate it, and now seeks, by the agency of the defendants claiming under him, to apply that money in satisfaction of his other engagements, and to deprive her of it altogether.

It was not necessary to produce the mortgage deeds or the bills of costs. The loans were brought forward to prove a general course of dealing, not as evidence of particular transactions. A course of dealing with respect to bills of exchange, may be proved without producing any of the bills upon which that course of dealing arose. *Roberts* v. *Doxon* (*b*), *Spencer* v. *Billing*. (*c*) So, where a tenancy is created by a written instrument, that instrument need not be produced if the existence of a tenancy between the parties, and not the terms of the demise, is the point to be established; *Rex* v. *Holy Trinity, Hull* (*d*); *Rex* v. *Merthyr Tydvil* (*e*); *Rex* v. *Hunt*. (*g*)

Bompas Serjt. in support of the rule. If it had been the intention of the learned judge who directed this issue, to confine the inquiry to the question whether the defendants had notice of the bankruptcy at the time of the seizure, he would have limited the issue accordingly. As the record is framed, the title of the plaintiffs, *as assignees*, is clearly in issue. Then, this is a case to which the 90th section of the 6 *G.* 4. *c.* 16. does not apply. It has been already observed by the court (*h*), that the language of this section is inapplicable to a feigned issue. It cannot be said that notice is to be given before the issue is drawn and when no action is pending.

(*a*) *Suprà*, 44.
(*b*) *Peake, N. P. C.* 83.
(*c*) 3 *Campb.* 310.
(*d*) 7 *B. & C.* 611., 1 *M. & R.* 444.
(*e*) 1 *B. & Adol.* 29.
(*g*) 3 *B. & Ald.* 566. And see *Deacon's Bankrupt Law*, 23.
(*h*) *Suprà*, 45.

The plaintiffs came prepared with proof in support of the bankruptcy. It is, therefore, not a case of surprise. (He was then stopped by the court.)

TINDAL C. J. The only question upon which I have felt any doubt is, whether the present case falls within the ninetieth section of the 6 *G.* 4. *c.* 16. so as to require notice to be given by the defendants of their intention to dispute the requisites of the bankruptcy. Upon looking at the terms of the ninetieth section, and considering the object for which a feigned issue is framed, it appears to me that this is not such an action as is contemplated by that section. The actions *by* assignees there spoken of, are clearly, actions brought to enforce contracts made, with themselves as assignees or with the bankrupt, or to recover compensation for injuries done to his real or personal estate. By actions *against* assignees, are meant, actions brought in respect of some contract actually made by them, or of some contract made by the bankrupt, which they have adopted, or of some wrong committed by them, under the supposed authority of the fiat. But this feigned issue was directed merely to inform the conscience of the court. Nothing can be more general than the terms in which it is framed. The allegation traversed is, "that at the time of the said seizing and levying of and upon the said cattle, goods, and chattels (*i. e.* under the writ of *fieri facias* against *Smark*), the plaintiffs were entitled to the same, as against, and free from, this execution; and that the said cattle &c. were not subject or liable to be so seized, or levied upon, under the said writ, as against the plaintiffs." It is impossible to read the issue without perceiving that the court required to be informed whether the plaintiffs were entitled to the property seized, or whether the defendants had a right to take it in satisfaction of their debt. The issue does,

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primâ facie, involve the whole of the plaintiffs' title; and it does not appear to me to give rise to the difficulty which the ninetieth section was intended to meet. When the parties are before the court or a judge, the feigned issue may be moulded in any shape by which the question between them—neither more nor less—may be raised. If, when the sheriff applied under the interpleader act, it had been understood that nothing was in dispute but the question, whether, at the time of the seizure, the defendants had notice of the granting of the fiat against *Smark*, it would have been easy to confine the issue to that particular point. I am therefore of opinion that the case does not come within the words or within the intent of the ninetieth section. It is just as if a wager were to be laid between third parties. Nor are the terms of that section capable of being applied to the case of a feigned issue. The notice, if from the defendants, is to be given "at or before pleading." But in this proceeding, it is well known, that no formal delivery of a plea takes place.

The point most strenuously contested at the trial appears to have been, whether *Smark* was a trader within the bankrupt laws. This will depend upon the second section of the 6 *G.* 4. *c.* 16. (*a*), by which "persons using the trade or profession of a scrivener, receiving other men's moneys or estates into their trust or custody" (*b*), are classed as traders liable to become bankrupts. In order to make out that *Smark* was a trader, it was necessary to shew that he fulfilled the whole of the statutory description applicable to traders of this class, and not merely that he was a scrivener negotiating loans and procuring money. It is not contended that *Smark* actually received his clients' money on more than two occa-

(*a*) *Suprà*, 49.

(*b*) The terms of this clause are taken from the 21 *Jac.* *c.* 19. *s.* 2., where they occur for the first time.

sions. In the case of Miss *Grigg*, if it had appeared that the 140*l.* which *Smark* called in by her direction, had remained in his hands for the purpose of being reinvested on her account when he should meet with a convenient opportunity for placing it out for her, the case would have been very different, and *Smark* might have been considered as acting, on that occasion, as such a scrivener as the statute describes. But the evidence shewed that *Smark* retained the 140*l.* for *himself*, paying interest as upon a *loan* to him. He therefore held the money, not as a depositary, but as a borrower. In the case of Miss *Torrens* the mortgage money was placed in *Smark*'s hands to be handed over immediately to the mortgagor. *Smark* had no such custody or trust of the money as would bring him within the statute. The law by which such cases as the present are governed is lucidly, and, I think, admirably laid down in the judgment of *Gibbs* C. J. in *Adams* v. *Malkin.* (*a*) It seems to me that the plaintiffs have not made out either of the propositions upon which they rely in support of the verdict; and the rule for entering a nonsuit must be made absolute.

COLTMAN J. I am of opinion that the language of the ninetieth section of the 6 *G.* 4. *c.* 16. is not applicable to the case of a feigned issue, in which there is no plea, in fact, by the defendant.

In order to know what the question was, which the judge by whom the issue was directed meant to be tried, we must look at the terms in which that issue is framed.

With regard to the second and principal point in the case, it is left to the court to decide, whether the evidence of trading was sufficient. I think it was not

(*a*) 3 *Campb.* 534.

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The cases distinguish between a money scrivener and a scrivener within the bankrupt acts. It appeared that *Smark* on some occasions negotiated loans, prepared the securities, and received procuration money from the borrower. Miss *Grigg*'s was the only case in which the money came into his hands; and, there, he received the 140*l.*, as her attorney, and was allowed to retain it, as a borrower.

ERSKINE J. It is objected on the part of the plaintiffs; first, that, in directing this issue, it was not the object of the learned judge to raise the question of the bankruptcy of *Smark*; secondly, that the defendants ought to have given notice to dispute, under the ninetieth section of the 6 *G.* 4. *c.* 16.; thirdly, that a trading as a scrivener, within the second section of that statute, was proved at the trial.

Upon the first point, it seems to me that the very generality of the terms in which the issue is framed, shews that it was intended by the judge who directed the issue, that every matter necessary to constitute the title of the plaintiffs should be put in issue. (*a*) Had it been otherwise, the issue would have been narrowed, by confining it to the question of notice. It has been argued that the apparent intention was, merely to leave it open to the defendants to select any of the requisites of the bankruptcy for attack, which they thought it worth while to assail at the risk of costs. But I agree with the rest of the court in thinking that cases of feigned issues are not within the ninetieth section. That section speaks of actions by and against assignees; by the former of which I understand to be meant, actions brought by plaintiffs suing for something due to them as assignees, or for some wrong done, in respect of

(*a*) *Vide Sandys* v. *Sandys*, 1 *A. & E. New Series*, 316. *n.*

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which they are entitled to recover damages for the benefit of the estate. Here, the very object for which the issue was directed was, to ascertain whether the plaintiffs were entitled to the property *as assignees of Smark*. I am therefore of opinion, that this is not a case within the ninetieth section, and that no notice to dispute the trading was necessary.

The proof of the trading appears to me to have wholly failed. That the transactions in which *Smark* was engaged, do not make him a scrivener within the second section, appears from the cases of *Adams* v. *Malkin* (*a*), *Bath, ex parte* (*b*), *Warren, ex parte.* (*c*)

To bring a man within the operation of the bankrupt law as a scrivener, it is not sufficient that he has negotiated loans, charging procuration money: it must be shewn that he is a person who receives other men's moneys into his custody or trust. Here, the only occasion on which *Smark* was entrusted with the money of a client, was that of Miss *Grigg*. But in that case the money was kept by *Smark* for his own purposes, and not with a view to laying it out again for his client. The verdict ought to have been for the plaintiffs.

MAULE J. I am of the same opinion. It is contended that as no notice had been given, the defendants were precluded from disputing the bankruptcy by the 6 *G.* 4. *c.* 16. *s.* 90. *Actions* only are there spoken of; and though, for some purposes, a feigned issue is an action, it is not so within the meaning of that section. The notice, to be given by the defendant before plea pleaded, can apply only to cases where the plea is the act of the defendant alone, and there is an interval between the declaration and the plea. In a feigned issue the de-

(*a*) 3 *Campb.* 535.
(*b*) *Montagu*, 82.
(*c*) 2 *Scho. & Lefr.* 414.

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fendant does not, as has been ingeniously suggested, adopt the act of the plaintiff and waive his right to plead; each party has as much to do with every part of the issue, as the other. Feigned issues are therefore not within the purview of the ninetieth section. The interpleader act speaks of issues and actions as different things. What the court intended should be tried here, was, whether all the requisites of a bankruptcy could be made out.

The point being open to the defendants at the trial, the question is, whether the evidence given proved a trading as a scrivener. The nature of the business of a money scrivener is somewhat obscure, but thus much appears to be clear—that it was an essential part of the profession of a scrivener to negotiate loans between borrowers and lenders. This however may be done by an agent never entrusted with the custody of the money. (*a*)

Some evidence was given at the trial, that *Smark* had been employed as a scrivener in negotiating loans. But it was not shewn that money had been placed in his custody for the purpose of being advanced on loan when opportunity should offer. In the only case in which he actually received the money of his client, he was a mere borrower.

Rule absolute. (*b*)

(*a*) And see *Wilson, ex parte*, 1 *Atk.* 217.; *Hankey* v. *Jones*, *Cowp.* 745.; *Willett* v. *Chambers*, *ib.* 814.; *Hamson* v. *Harrison*, 1 *Esp. N. P. C.* 556.; *Hutchinson* v. *Gascoigne*, 1 *Holt, N. P. C.* 507.; *Hurd* v. *Brydges*, *ib.* 654.; *Gem, ex parte, in re Rumsey*, 2 *Mont. Deac. & De Gex*, 99.

(*b*) See the next case.

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June 12.

Where the claimants of goods taken in execution fail upon an issue directed to try the validity of the claim, under the interpleader act, the course is, to require them to pay the costs of the application and of the subsequent proceedings.

So, when the claimants set up a claim as assignees of a bankrupt, and they fail upon the insufficiency of proof of the bankruptcy.

AS soon as judgment had been pronounced in the preceding case, *Bompas* Serjt., on behalf of the above-named plaintiffs, the execution creditors, moved for, and obtained, a rule calling upon *Lott* and *Pidgeon*, the claimants of the goods taken under the *fieri facias* against *Smark*, to shew cause why the money paid into court under the interpleading order, should not be paid out to the above-named plaintiffs, and why the claimants should not pay to them their costs of, and occasioned by, the application under the interpleader act, and of, and occasioned by, the issue, and of the motion to set aside the verdict, and of the present motion.

Manning Serjt. now shewed cause. By the interpleader act, 1 & 2 *W.* 4. *c.* 58. *s.* 6., the costs of the proceedings under that section, for the relief of sheriffs, are to be in the discretion of the court. Here, the claimants were persons appointed assignees under a fiat regularly issued, and upon which an adjudication of bankruptcy had been made by persons authorised under the great seal. The claimants, therefore, could not avoid taking upon themselves the office of assignees; they would have been punishable for refusing to do so. It cannot be disputed that if the claimants *were* assignees of *Smark*, the claim is one which they might properly make, and that they would have been guilty of a breach of duty towards the creditors, whose interests they were appointed to protect, if they had omitted to urge it. This is not a case where the assignees have a discretion to exercise as to particular goods, which may or may not have been the property of the bankrupt, and where they

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must take the consequence of not exercising a sound discretion. Here, the only question was, whether the claimants were assignees or not; a question which they *could* not decline trying. In the ordinary case, when the question arises as to the property in particular goods, the assignees, if they fail, may fall back upon the bankrupt's estate for reimbursement and indemnity. Here, they have no such fund to resort to, since, if *Smark* was not a trader, he is entitled to have all his property restored to him, and the claimants will have no remedy for their costs either against *Smark* or against the creditors for whose benefit this claim was made. Besides this, the question as to the trading was one of great nicety, which any person, even not circumstanced so peculiarly as these claimants were, might very fairly raise.

Andrews Serjt. appeared on behalf of the sheriff.

Bompas Serjt. appeared in support of the rule.

TINDAL C. J. In cases of interpleader the court of Chancery always requires the unsuccessful party to pay the costs. (*a*) The same course has been adopted, in practice, by the courts of common law, acting under the late statutes. I see no reason for pursuing a different course when the claimants happen to be assignees of a bankrupt.

The sheriff will, of course, have the costs incident to the execution of the writ, and his poundage.

The other judges concurred.

Rule absolute.

(*a*) And see *Warren, ex parte*, 2 *Scho. & Lefr.* 414.

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SMITH and Another *v.* DOBSON, Knt., and Others.

May 25.

CASE. The declaration stated, that the plaintiffs, before and at the time of the committing &c., were lawfully possessed of a certain barge of great value, to wit, &c., then lawfully being in the river *Thames*, and the defendants were also then possessed of a certain steam boat in the said river, and then, by their servants, had the care, direction, and management of the same; yet the defendants, not regarding their duty in that behalf, whilst the said barge and steam boat respectively so were in the said river, to wit, on &c., took so little and such bad care of their steam boat, and, by their said servants, governed and navigated the same in so unskilful and improper a manner, and then wrongfully and improperly navigated and propelled the steam boat, and caused and suffered the same to be navigated and propelled, in the said river so near to the said barge, and at such a rapid and dangerous rate, that by reason and means of the premises an unusual and dangerous swell and disturbance of the water of the said river, near to, and about, the plaintiffs' said barge was then caused and produced; and by reason of the premises, divers large quantities of the water of the said river were then thrown, and then flowed, into and upon the said barge, and the same was thereby overwhelmed and filled with water, and was thereby sunk in the said river, and by reason thereof the said barge was then greatly broken, strained, damaged, and injured, and divers large

In an action for improperly navigating a steam boat, whereby the plaintiffs' barge was sunk, it appeared that a large steam vessel preceded the defendants' steam boat, and partly occasioned the swell which caused the injury, and also that the plaintiffs' barge was improperly trimmed and insufficiently manned. The jury found a verdict for a fourth part of the damage actually sustained, alleging as a ground for so doing, that blame was not attributable to the defendants alone, the barge not being properly trimmed. Held, that although this allegation might have been a reason for directing the jury to reconsider their verdict, it furnished no ground for granting a new trial.

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quantities of coal of the plaintiffs' therein being, to wit, &c., of the value &c., were destroyed and wholly lost to the plaintiffs; and also, by means of the premises, not only the said barge became, and was, greatly damaged and injured, but the plaintiffs then incurred great expenses, to wit, &c., in and about raising the said barge from and out of the said river, and clearing the same from the water and soil, and repairing the said damage so done to the same, &c.

Plea: not guilty.

At the trial before *Tindal* C. J. at the sittings at *Guildhall* after *Easter* term last, the plaintiffs gave in evidence, that while the barge was crossing the river, the defendants' steam boat, the *Water Lily*, passing rapidly up the river, created a swell which filled and sunk the barge, occasioning a total loss of fifty tons of coals, of the value of 80*l*. On the part of the defendants it was shewn that a larger steam vessel, the *Ramona*, preceded the *Water Lily* by about 200 yards; that the *Ramona* was of the burthen of 250 tons, with engines of 100 horse power, and drew ten feet water, whilst the *Water Lily* was only 100 tons, with engines of forty horse power, and drew three feet four inches; that the plaintiffs' barge was insufficiently manned, having on board only one man and a boy, the former of whom was in liquor; and that the barge was overloaded, and also badly trimmed, being seven inches deeper in the water on the one side than on the other.

The Lord Chief Justice told the jury, that the plaintiffs were not entitled to recover if, in their judgment, the misconduct of the plaintiffs' servants or the insufficient manning of the barge *contributed* to the loss, or if the injury was occasioned wholly by the *Ramona*. The jury returned a verdict for the plaintiffs, the foreman saying, "We give only 20*l*. damages against the defendants, inasmuch as we think the blame is not attributable to them alone, and because the barge was not

properly trimmed." The Lord Chief Justice gave the defendants leave to move to enter a verdict for them.

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Shee Serjt. now moved accordingly for leave to enter a verdict for the defendants, or a new trial. The finding of the jury, qualified by the statement by which it was accompanied, entitled the defendants to a verdict in their favour. If the injury was occasioned partly by the misconduct of the plaintiffs or their servants, they are not entitled to recover; *Marriott* v. *Stanley*. (*a*) But supposing the court receive the verdict without the qualification, there was, in fact, no evidence which would support a verdict for the plaintiffs.

TINDAL C. J. I see no ground whatever for entering a verdict for the defendants. The jury meant to say that the loss was partly owing to one steam boat and partly to the other. Neither is there any ground for sending the case to a new trial. The jury took into their consideration the circumstance that the barge was not well trimmed. It might, however, have crossed the river in safety but for the swell raised by the *Water Lily*.

COLTMAN J. An incidental observation made by one of the jury in delivering the verdict, cannot be looked at as part of the verdict, although it may well induce the judge to request the jury to reconsider the case. The foreman is to give in the verdict, but he has no power to qualify that verdict by any observation he may think fit to add.

ERSKINE J. I also am of opinion that there is no ground for entering a verdict for the defendants, and that the verdict found for the plaintiffs was right. The

(*a*) *Antè*, Vol. I. p. 568. 853.; and see *Lynch* v. *Nurden*, 1 *A. & E. New Ser.* 29.

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jury might well conclude from the evidence that the defendants had either caused or contributed to the accident. Though the swell occasioned by the *Water Lily* might not have sunk the barge if the water had not been previously agitated by the *Ramona*, still, if the jury thought that the accident would not have occurred but for the improper conduct of the defendants' servants, the defendants were in strictness liable for the whole damage. The jury appear to have thought it not fair to hold the defendants liable for the whole damage when they were not alone in fault. Though the jury, in taking this view of the case (*a*), may have been justified in reducing the damages, it can form no ground of complaint on the part of the defendants.

MAULE J. I also am of opinion that there is no pretence for disturbing this verdict on the motion of the *defendants*. It has been suggested that the finding amounted to a verdict for the defendants, the jury having irregularly assigned a reason for giving the plaintiffs smaller damages than they were, perhaps, entitled to recover. Scarcely any verdict would stand if it could be set aside because the jury had reasoned inconclusively. The trial by jury is not founded upon an absurd supposition that all twelve will reason infallibly from the premises to the conclusion.

Rule refused.

(*a*) No action would lie against the owners of the *Ramona*, if it appeared that, notwithstanding any wrongful act on their part, no injury would have resulted to the plaintiffs but for the *subsequent* wrongful act of the defendants. The view of the case thus taken by the jury would, therefore, exclude the plaintiffs from recovering an adequate indemnity for the wrong and injury which they had sustained.

The leave to move to enter a verdict for the defendants appears to have been founded, less upon any question of liability as between the *Ramona* and the *Water Lily*, than upon the question of liability as between the latter and the damaged barge, improperly stowed, and insufficiently navigated by a drunken man and a boy. As to the admissibility of the defence under the plea of not guilty, see Vol. I. 570. n.

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May 28.

CASE. The declaration stated, that before the committing, &c., to wit, on the 1st of *July* 1808, a certain publication had been printed and published, purporting to be a copy of a certain deed bearing date the day and year aforesaid, and purporting to contain, among other things, a recital, from the deed, that the public having derived great benefit from the establishment of a society known by the name or style of the Norwich Union Society, formed for the purpose of insurance of houses, buildings, goods, merchandizes, and effects from loss or damage by fire, and that it appeared from mature consideration, that many advantages and great benefits might arise, and be secured to great numbers of persons in particular situations of life and circumstances of fortune, from the establishment of a society, to be composed of such persons as should be qualified and willing to become mutual contributors for equitable insurance on lives and survivorships, upon premiums proportionate to the chance of death attending the age of the life to be insured, and to the time for which such insurance was to be continued; and for granting and selling annuities for life or lives for a gross sum in hand paid, and that it was then further stated by the said indenture, that the parties whose names and seals were thereunto subscribed and affixed, being willing to procure, every of them to themselves respectively, or to their several and respective executors, &c., and to insure to others who should unite themselves

Case lies for false representations as to the affairs of an insurance company, whereby the plaintiff was induced to effect an insurance with the company, although no actual pecuniary damage has been sustained, beyond the payment of premiums.

In an action for misrepresentation as to the proceedings of an insurance company, the declaration set forth several rules and regulations of the company, and alleged that the defendant fraudulently represented that these rules and regulations had been complied with, knowing the fact to be otherwise. A plea, — stating that these rules and regulations had been *so fully* complied with as was necessary for the maintenance of the company, and of such insurances as had been, or might be, effected, — was held bad.

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with them, the advantages and benefits that might arise from establishing themselves into a society for effecting equitable insurances on lives and survivorships, and for granting annuities, did thereby covenant, every of them for themselves respectively, with all and every the others of them, to become, by mutual contributions, insurers on lives and survivorships, and grantors of annuities, and to become members of, and to enter and erect themselves into, a society by the name of the Norwich Union Society, for insurances on lives and survivorships, and for granting annuities, upon such terms, premiums, and conditions, and under such constitutions, laws, rules, and regulations as should be thereafter in the said indenture expressed, declared, or provided for, and for such time and term to continue members thereof as should be signified in the policies of insurance to be made out and delivered to every of them respectively; and that for the better establishing their said society, and governing and regulating the same and the proceedings thereof, and the more effectually to make provision for producing and securing to them the several beneficial ends and purposes thereby intended, the subscribers to the said indenture severally covenanted, every of them, for themselves respectively, with all and every the others of them, to observe, perform, abide by, conform to, fulfil, and keep all and singular the articles, clauses, provisoes, powers, conditions, laws, constitutions, ordinances, regulations, and agreements hereinafter contained, and, amongst others, the following; that is to say — Thirdly: That, for the more orderly and effectual management of the affairs of the said society, there shall, during its continuance, be twenty-four members of the said society who shall be directors thereof, and shall so continue during the subsistence of their respective policies, or until they shall die, resign, or be removed; and that the trustees of the society, to

be chosen as thereinafter mentioned, shall have power, from time to time, to choose additional directors, as and when such trustees shall see occasion, and shall also choose new directors to supply such vacancies in their number as shall, from time to time, occur by death, resignation, or otherwise. Fifthly: That any twelve or more of the said directors (except in case of any contagious sickness, which is hereinafter particularly provided for) being assembled together in consequence of an advertisement to be inserted in both the *Norwich* newspapers, for two successive weeks, in the place appropriated to, and generally used for, that purpose, shall be called a court of directors of the said society, which court shall meet some time in the month of *December* in every year, and oftener, if it shall be found necessary, to receive and examine the statements of the affairs and transactions of the society, which shall be then laid before them by the secretary of the society; that such court of directors, by and with the assistance and advice of the secretary for the time being, shall order and direct all the affairs of the said society, according to the rules, ordinances, and regulations therein particularly mentioned, or according to such by-laws, regulations, or ordinances as shall, at any time or times hereafter, be made by a general meeting or general meetings of the society. Sixthly: That for facilitating and dispatching the business of the society, six of the directors shall constitute a committee of directors; but that no director shall be a member of such committee unless he shall be insured, by and with the society, in the sum of 100*l.* or upwards, upon or for the whole duration of life; and that the committee shall meet weekly at the house or office of the society, on any day that they may find most convenient, and shall attend such weekly meetings without any summons or notice; that the committee, at any such weekly meeting, consisting of not less than three members, shall

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have power to receive the applications of all persons desirous of becoming members of, and effecting insurances with, the society, or of purchasing annuities of them, and also to propose and settle the rates of premium to be demanded for the insurance of lives and survivorships, and to make such alterations in the same as shall be thought necessary; and also to determine the requisites and qualifications necessary to be found in those whose lives shall be proposed to be insured by and with the society, or who shall propose to purchase annuities of the society, and to direct the form and method to be observed in making the proper and necessary advance in the premiums of insurance which ought, for the security of the society, to be taken when the occupation or other circumstances attending the person whose life is to be insured, shall appear more hazardous than common, and, as such committee shall see cause, to admit or reject the same; and that the said committee shall have power to sign, execute, and issue any policy of insurance or grant of annuity, to order investments of the funds of the society in the names of the trustees, or any four of them, and to manage and transact all other usual and customary business of the society; that the said committee may, from time to time, elect, nominate, and appoint such treasurers, solicitors, and agents, to transact the business of the society as to them shall appear meet, and at their will and pleasure may remove such treasurer, &c.; and that the said committee may also make such allowances as they shall think proper to such treasurers, &c., transacting the business of and to such other persons as shall or may recommend insurances to the society; that when any vacancy shall occur in the committee by death, resignation, or otherwise, such vacancy shall be immediately supplied from amongst the general body of directors by the votes of a majority of the directors

present at a court to be summoned for that purpose; but that no directors who shall be so chosen, shall be deemed members of the committee, until their election shall have been confirmed by the votes of a majority of the directors present at a second court of directors; such second court to be held not less than ten or more than twenty-one days after the court at which such directors shall have been first elected; that if it shall happen that neither the president nor either of the vice-presidents shall be members of the committee, a chairman shall be elected from amongst themselves, who shall exercise the office of vice-president at the weekly and other meetings of the committee of trustees; that there shall be twenty-four trustees for the society, who shall be gentlemen of property and respectability, and shall continue in their situations as trustees, until they shall die, resign, or be removed; and that a majority of the directors of the society, present at any court, shall have power, from time to time, to choose additional trustees, as and when such directors shall see occasion, and shall also choose new trustees to supply such vacancies as shall occur by death, resignation, or otherwise; that all securities taken by the society shall be taken by and in the names of the trustees, or by and in the names of any four, or more, of them, that the committee of directors shall appoint; and if any of the said trustees shall resign or be removed in manner hereinafter mentioned, those who shall so resign or be removed, shall, in case of resignation, immediately after having signified to the secretary their intention to resign, and, in case of removal, immediately upon the resolution for their removal being notified to them by the secretary in writing, surrender up and assign all their estate and interest in all or any of the said securities and in the said trust, in such manner and to such persons, as the said committee of directors shall

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appoint. Twelfthly: That there shall be a secretary to the society who shall give constant attendance by himself or his clerk, at the house or office of the society in each day (*Sundays* and certain holidays, to be named by the committee of directors, only excepted) in order to receive the proposals of persons desirous of becoming members of, or of being insured with, the society, or of purchasing annuities of them in any of the ways or methods hereinafter mentioned; and that the secretary (with the assistance of such clerks as he may find necessary) shall, in a fair and clerk-like hand, method, and manner, write and keep all such books as the occasions of the society shall require, and that the secretary shall also attend, and be present at, all the weekly and other meetings of the said court and committee of directors, and shall make up and enter the minutes of the proceedings and orders of the said court and committee of directors, and of the general meetings of the society, and shall see that the orders made by the said court and committee of directors, touching the disposition of the moneys of the society, and all other orders of the said court and committee of directors, at their weekly and other meetings are duly complied with and carried into execution; and that whenever the office of secretary to the society shall become vacant by death, resignation, or removal (except in the case hereinafter mentioned), the said committee of directors shall immediately elect some person to fill the said office until a general meeting of the society can be duly summoned, and that a majority of the members present at such general meeting shall have power, either to confirm the choice of the committee or to elect such other person as they shall think fit, to fill the office of secretary to the society; but in neither case shall such secretary be considered duly elected until his election shall have been confirmed by a majority of the members present

at a second general meeting of the society, such second meeting to be held not less than ten or more than twenty-one days after the meeting at which such secretary shall have been first elected. Fourteenthly: That at the end of twelve months from the date of these presents, the secretary of the society shall be allowed 10 per cent. on all premiums received for insurance, and that, in each succeeding year, such allowance shall decrease at the rate of 1 per cent. per annum until the society shall have been established six years, when it will amount to 5 per cent., which sum of 5 per cent. shall thenceforward be the regular and stated allowance that shall be made to the secretary as a remuneration for his services; provided, nevertheless, that out of such allowance or per centage the secretary for the time being shall pay the salaries of all such clerks as he shall find it necessary to employ for carrying on the business of the office. Twentiethly: That Mr. *Thomas Bignold* shall be the first and present secretary to the society; and that, in consideration of his exertions in its establishment, he shall be allowed to nominate either of his sons *J. C. B.*, *T. B.*, or *S. B.*, as his successor; and that such son as may be so named by the said *Thomas B.* to succeed him shall enter on the said office, and be to all intents and purposes the secretary of the society without the forms of election hereinbefore prescribed, immediately on the death, resignation, or removal of the said *Thomas B.* Twenty-fifthly: That once in two years, between *June* and *September*, the secretary shall prepare an account of the state of the society's funds or finances, and shall calculate the outstanding risks, and that an allowance of 1*s.* per annum for every 100*l.* insured with the society, shall be made to the secretary for such calculations, in consideration of the great extra trouble and labour with which they will be attended. Twenty-sixthly: That within one month after the com-

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pletion of each biennial calculation, a general meeting of the members of the society shall be called in manner hereinbefore directed; and that if it shall appear to such general meeting that the funds of the society are more than sufficient to pay the claims made, or liable to be made, upon the society, the members present at such general meeting shall declare a dividend of the surplus (after reserving one fifth part of such surplus, which shall be funded for the purpose of accumulating and forming a permanent capital to answer demands in case of any extraordinary mortality amongst the members) unto and amongst those members who shall be insured by and with the society, upon and for the whole duration of life (those who shall have become members in the then current year only excepted) in manner following, &c.; but if it shall appear to such general meeting that the funds of the society will not be sufficient to pay the claims made, or then liable to be made, thereupon, it shall be lawful for such general meeting to direct that such sums of money shall be paid by the members of the society (in proportion to the amount of their respective insurances) as shall be found necessary to make good the deficiency; and if any member or members shall refuse or neglect to pay the whole or any part of the sums so directed to be paid, at such time or times and in such manner as the said general meeting shall appoint, then it shall be lawful for the said general meeting to inflict such penalties as they shall think reasonable and proper on the defaulter or defaulters; and if the sum so directed to be paid, or any part thereof, or the penalties so imposed for nonpayment thereof, shall be unpaid by the space of sixty days next after the infliction of such penalties, then the sums so remaining unpaid, and the penalties so imposed for nonpayment thereof, with full lawful interest therefore to be computed from the time of inflicting such penalties,

shall become a charge on, and, if not otherwise satisfied, be deducted out of, the shares, claims, or demands which such defaulters, or their executors, &c. shall or may then, or at any time or times thereafter, have upon or against the society, by virtue of any policy of insurance or otherwise howsoever: provided always that credit shall be given in the books of the society to all such persons as shall pay the sums so required of them, and that such sums, together with lawful interest for the same, shall be repaid to them, their executors, &c., as soon as the affairs of the society will admit thereof; provided also, that no such sums shall be required to be paid, if the majority of the members present at such general meeting shall be of opinion that it would be better to reduce the sums payable to the respective claimants on the said society by virtue of policies of insurance, than to require any such payment to be made. Thirty-fifthly, and lastly: That these presents, and every thing therein contained, whether the same be mentioned by way of covenant, agreement, or undertaking, or by way of future constitutions, laws, rules, or ordinances of and for the regulation of the said society, shall be binding, in every respect, as well on all persons taking policies and becoming contributors and members thereby, as on all persons thereunto subscribing.

Averment: that afterwards, to wit, on the day and year first aforesaid, a certain society was constituted for the purposes aforesaid, and falsely pretended and assumed to be constituted and conducted according to the deed so recited and set forth in the said publication; and that before the committing &c., to wit, on the 1st of *July* 1831, the defendant, then being and acting as the secretary of the society, did issue, circulate, and distribute, for and in the name of the society, so falsely pretending to be constituted and conducted as aforesaid, and then called the Norwich Union Life Insurance

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Society, a certain prospectus or printed statement of the funds and regulations of the society, and of the bonuses that had been declared on the amount of premiums deposited by the members at various periods since the formation of the society up to the year 1829, which said prospectus or printed statement contained, among others, the statements following, that is to say, that the first addition to the sums insured in the said office was made on the 28th of *June* 1816, when a bonus of 20 per cent. was declared on the amount of premiums deposited by the members insured previously to *July* 1815, that the second addition, assigned on the 28th of *July* 1823, was 24 per cent. on all premiums deposited prior to *July* 1822, making, on the payments made previously to *July* 1815, a total addition of 44 per cent., and that the third addition was declared on the 29th of *August* then last, and was 25 per cent. on all premiums deposited prior to *July* 1829, making a total addition of 69 per cent. on all assurances effected prior to 1815, and of 49 per cent. on all assurances effected prior to 1822; that afterwards, and before the committing, &c., to wit, on the 9th of *July* 1831, the plaintiff, being desirous of effecting an insurance with the company for the term of his life, on such terms and conditions as the company and the plaintiff should mutually agree, did apply to the defendant, so then being the secretary as aforesaid, for information about the same, and did inquire of the defendant, and request the defendant to inform him the plaintiff, whether the above recited articles, provisoes, &c. contained in the said deed of settlement, as set forth in the said publication, had been duly complied with, performed, observed, kept, and fulfilled, and whether the above recited statements concerning the funds and pecuniary affairs and prosperity and bonuses of the society so contained in the said prospectus or printed statement of, &c. were true

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and correct; nevertheless, the defendant, well knowing the premises, and that the above recited articles, provisoes, &c. so contained in the said deed of settlement, had not nor had any of them been duly complied with, observed, kept, or fulfilled, and that the above recited statements concerning the funds and pecuniary affairs and prosperity and bonuses of the society, so contained in the said prospectus or printed statement of, &c., were not, nor were nor was any of them strictly true or correct, but contriving and fraudulently intending, craftily and subtly to deceive and injure the plaintiff in this behalf, on the day and year last aforesaid, falsely, fraudulently, and deceitfully, in answer to the said inquiries, did represent and affirm that the above recited articles, provisoes, &c. so contained in the said deed of settlement, had, and each and every of them had, been duly complied with, performed, observed, kept, and fulfilled, and that the above recited statements, concerning the funds and pecuniary affairs and prosperity of the society, so contained in the said prospectus or printed statement of, &c. were, and each and every of them was, strictly true and correct. By means of which representations and affirmations so made as aforesaid, the plaintiff, not knowing to the contrary, but believing therefrom that the said society was in the condition and in the circumstances and state so described and affirmed by the defendant, and that its affairs were duly, lawfully, and regularly administered and conducted according to, and in conformity with, the several above recited articles, &c. so contained in the said deed of settlement, afterwards, to wit, on the said 11th of *July* 1831, entered into a certain policy of insurance with the society, on his, the plaintiff's, life, for the time and upon the terms therein mentioned (which policy of insurance, sealed with the seal of *John Patteson*, *Francis Noverre*, and *John Crowe*, the date whereof was the

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day and year last aforesaid, the plaintiff brought into court (*a*)), and paid thereon, according to the terms of the said policy, to the society when the same became respectively due, divers sums of money, to wit, 84*l.* 5*s.*, as and for a premium on such policy of insurance for one year, commencing from the day and year last aforesaid, and ending on the 11th of *July* 1832.

The declaration then set out annual payments of premium to the year ending on the 11th of *July* 1840. Averment: that the defendant, at the time of making the said representations and affirmations, well knew that the recited articles, &c. contained in the deed of settlement had not been, nor were, duly performed, complied with, observed, kept, or fulfilled, in this, to wit, that the trustees had not chosen and did not choose, new directors to supply such vacancies in their number as had, from time to time, occurred by death, resignation, or otherwise, but, on the contrary thereof, when and before the committing, &c., to wit, on the 22d of *May* 1815, one of the said directors, to wit, *Starling Day*, &c., died, no new director was elected in his place to supply such vacancy, according to the provisions of the deed. The declaration then set out a similar omission upon other vacancies occurring. Averment: that twelve or more of the directors, called a court of directors of the society, did not meet at any time in the month of *December* in every year, to receive and examine the statements of the affairs and transactions of the society which should have been then laid before them by the secre-

(*a*) It is said in *Com. Dig. Pleader*, (O 3.), that there need be no profert of a policy of insurance; but on referring to the case there cited (*Suister* v. *Coell*), 1 *Siderfin*, 386., though the policy is declared upon as made *per scriptum*, it is not said to be *sigillatum*. Here, however, the deed is pleaded by way of inducement; the action not being founded thereon. Profert appears therefore to have been unnecessary. See *Banfill* v. *Leigh*, 8 *T. R.* 571., 1 *Wms. Saund.* 9.

tary of the society, and by and with the assistance of the secretary for the time being, to order and direct all the affairs of the said society, but on the contrary thereof, in the month of *December* 1826, no such number of twelve or more of the directors did meet for the purposes aforesaid. Similar averments as to the four following years. That no committee of the directors, constituted as in the said deed poll was provided, did meet weekly at the house or office of the society, amongst other things, to order investments of the funds of the society in the names of the trustees, or any four of them; but, on the contrary thereof, divers, to wit, 1000 weeks, commencing from the 23d of *June* 1814, and ending the 23d of *June* 1831, were suffered to elapse without any committee of directors, so constituted as in the said deed poll was provided, meeting at the house or office of the society, and without any investments of the funds of the society being so ordered in the names of the trustees or any four of them, as in the said deed poll was also provided; and that for a long space of time, to wit, from the 24th of *June* 1814 to the 24th of *June* 1831, twenty-four directors of the society were not nor were new trustees, chosen to supply such vacancies in their numbers as did, from time to time, occur by death, resignation, or otherwise, according to the provisions of the recited deed. That the securities taken by the society were not, nor had been, taken by and in the names of the trustees, or by and in the names of any four of them, that the said committee of directors had appointed; but on the contrary thereof afterwards, to wit, on the 25th of *June* 1825, divers securities, to wit, 1000, taken by the society for a large amount, to wit, to the amount of 50,000*l.* were taken by, and in the name of, the defendant, contrary to the provisions and effect of the deed of settlement. That the defendant, then so being secretary of the said society, had

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not seen and did not see, according to the provisions and effect of the deed of settlement and his duty in that behalf, that the orders made by the court and committee of directors touching the disposition of the moneys of the society, and all other orders of the said court and committee of directors, at their weekly and other meetings, were duly complied with and carried into execution. That the defendant being secretary to the said society as aforesaid, did not, once in two years, between the months of *June* and *September*, prepare an account of the state of the society's funds or finances, and calculate the outstanding risks; but on the contrary thereof, afterwards, and before the committing, &c., to wit, on the 24th of *June* 1831, suffered and permitted a long space of time, to wit, sixteen years, beginning, &c. and ending, &c. to elapse without any such account, contrary to the provisions and effect of the deed of settlement. That no general meeting of the members of the society was called, as by the twenty-sixth article of the deed of settlement was required and directed; but on the contrary thereof, although no such meeting was called, and although the funds of the society were not more than sufficient to pay the claims made, or liable to be made, upon the society, yet afterwards and before the committing, &c., to wit, on the 29th of *August* 1830, a certain dividend of supposed surplus was declared unto and amongst the members insured by and with the society, without reserving one fifth part of such surplus, to be funded for the purpose of accumulating and forming a permanent capital to answer the demands that might be made upon the society in case of any extraordinary mortality amongst the members, contrary to the provisions, effect, and meaning of the deed of settlement; and that, in truth and in fact, the above recited statements concerning the funds and pecuniary affairs and prosperity of the society,

so contained in the said prospectus or printed statement of, &c. were not, each or any of them, strictly true and correct, in this, to wit, that the third addition to the sums insured, which was declared on the 29th of *August* 1830, of 25 per cent. on all premiums deposited prior to *July* 1829, making a total addition of 69 per cent. on all insurances effected prior to 1815, and of 49 per cent. on premiums deposited prior to 1822 was, in truth, a false and fraudulent addition, the funds of the society not being more than sufficient to pay the claims made, or liable to be made, upon the society, after reserving one fifth part of such surplus to be funded for the purpose of accumulating and forming a permanent capital to answer the demands that might be made upon the society, in case of any extraordinary mortality amongst the members, as by the twenty-sixth article it was required should be done. By means whereof, and of the said fraudulent misrepresentations and deceit of the defendant, the plaintiff had been defrauded and deceived in making and effecting the said policy, and in making the said payments of the said premiums, from time to time, and the said policy was of much less value to the plaintiff than if the said representations of the defendant had been true in substance and in fact, to wit, 1000*l.* of less value; and by means thereof the plaintiff was likely to lose the whole benefit of his said policy and of the said sums of money so paid by him as aforesaid to the said society as premiums for the same.

Fifth plea: that the articles, provisoes, powers, conditions, laws, constitutions, ordinances, regulations, and agreements contained in the deed of settlement, had been and were *so* fully complied with, performed, observed, kept, and fulfilled, and the funds and pecuniary affairs of the society had been and were *so* duly regulated and administered, as was necessary for the maintenance and security of the society, and of such in-

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surance as then had been, or thereafter might be, effected therewith. Verification.

Special demurrer, assigning for causes, that the plea, instead of containing a distinct and certain answer to the several and specific averments of breaches and non-performances of the said articles, provisos, &c. in the deed of settlement, contained only a general statement that the same had been and were duly complied with, performed, observed, kept, and fulfilled, and the funds and pecuniary affairs of the said society had been duly regulated and administered, not shewing how and in what manner the same had been kept and fulfilled, or to what particular breach in the declaration the plea related, or whether it referred to affirmative or negative provisos, powers, &c., or whether it related merely to the effect of observing and keeping the said articles, &c., or whether it was intended to allege that they were in fact respectively kept and observed; that it was alleged in the plea, that the said articles were duly complied with, performed, observed, kept, and fulfilled, and the funds and pecuniary affairs of the society had been and were duly regulated and administered thereby, by using the word "duly," raising for the consideration of the jury a question of law, and not one of fact merely; that the plea was so general and uncertain, that no intelligible issue could be raised or taken thereon; that the plea did not confess and avoid, or deny, any of the material allegations in the declaration, in such a manner that the plaintiff could safely reply thereto; that if the plaintiff replied thereto, he could only restate and repeat the breaches already alleged in the declaration; that the plea was double and multifarious; that it should have concluded to the country, and not with a verification; that it was pleaded as if it were an answer to the whole declaration, whereas it was only an answer

to part thereof, and that it contained an immaterial traverse. Joinder in demurrer. (*a*)

Stephen Serjt. (with whom was *Petersdorff*), in support of the demurrer. The defendant has put a frivolous plea upon the record, for the purpose of inviting a demurrer. The declaration is for false and fraudulent representations, — the most prominent of which is the statement, that the proprietors were entitled to a bonus of 75 per cent.; — whereby the plaintiff sustained damage. The plea (which is pleaded, together with the statute of limitations and a variety of other defences,) admits the truth of all these allegations. [*Tindal* C. J. In substance the defendant says, "You are not *much* hurt."] In other words, the plea is pleaded to the *amount* of damages. [*Maule* J. The plea does not meet that part of the declaration which charges the defendant with issuing a fraudulent prospectus. *Tindal* C. J. asked *Channell* Serjt. if he meant to support the plea.] The plea is insufficient in form and in substance. It is an argumentative denial of the allegation of damage. The traverse of an allegation should, in substance if not in form, be in the terms of that allegation. The plea is evasive in another point of view. It merely says that the articles, &c. were *so* duly performed as was neces-

(*a*) The points marked for argument by the plaintiff were an echo of the special causes of demurrer.

The points marked by the defendants were, "That the declaration was insufficient, and disclosed no right of action, inasmuch as, even if the alleged misrepresentations were made, it did not appear that the plaintiff had sustained any injury thereby, either by the loss of his policy or by any insecurity in his insurance; that there was nothing in the declaration which connected the alleged misrepresentations with any depreciation in the value of the policy, or which shewed that the insurers were unable or unwilling to satisfy any demand upon them which might arise under the policy, or that the insurance had been abandoned by the plaintiff, or that he had been injured in any respect by effecting it."

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sary for the maintenance and security of the society. The allegation in the plea should have been, "True it is that the articles were not performed, but the non-performance was not material;" *Griffiths* v. *Eyles.* (*a*) Here, the language of the plea is too general for a plea of a qualified performance.

The plaintiff could have replied to this plea only by re-asserting the allegations of the declaration. It is true, that no pecuniary damage actually sustained is shewn in the declaration; nor was it necessary. In *Furnis* v. *Leicester* (*b*) an action was held to be maintainable against a party who had sold to the plaintiff the sheep of *J. S.* a stranger as his own, although it was objected that the declaration did not shew that the plaintiff had damage, or that *J. S.* had retaken, or sued for, the sheep. So, in *Blofield* v. *Payne* (*c*), it was held that a manufacturer, whose mark is used by another manufacturer, may maintain an action for the piracy, though he has sustained no actual damage; *Marzetti* v. *Williams* (*d*); *The Tunbridge Dipper's case* (*e*); *Lyde* v. *Barnard.* (*g*) But supposing the allegation of damage in the declaration to be insufficient and defective, the objection for want of certainty and particularity, could be taken only upon special demurrer; the fault is cured by pleading over. In *Pewtress* v. *Austen* (*h*), this court refused to arrest judgment upon a count for a deceit, in which it was averred, that the defendant represented to the plaintiff, that a lessor required 150*l.* premium for a lease, whereas he required only 100*l.*; *whereby the de-*

(*a*) *B. & P.* 417.
(*b*) *Cro. Jac.* 474.
(*c*) 4 *B. & Ad.* 410., 1 *N. & M.* 353. But see *Williams* v. *Mostyn*, 4 *M. & W.* 145. 154.; *Sykes* v. *Sykes*, 3 *B. & C.* 541., 5 *Dowl. & Ryl.* 292.
(*d*) 1 *B. & Ad.* 415.
(*e*) *Weller* v. *Baker*, 2 *Wils.* 414.
(*g*) 1 *M. & W.* 101., *Tyrwh. & G.* 250.
(*h*) 6 *Taunt.* 522., 2 *Marsh.* 217.

fendant fraudulently obtained from the plaintiff 50*l.*, without alleging that the 50*l.* was paid by the plaintiff in addition to the 100*l.* which he was bound to pay. The effect of pleading over in the present case is the same as that of the verdict in *Pewtress* v. *Austen* (*a*). *Trower* v. *Chadwick* (*b*) is one of a series of cases establishing this proposition. *Brown* v. *Jarvis.* (*c*)

Channell Serjt. (with whom was *Talfourd* Serjt.), *contrà*. It is submitted that this plea is good. The plaintiff can recover, only by shewing both a wrongful act done by the defendant and resulting damage to himself. The proposition that special damage need not be proved, is untenable. In *Lyde* v. *Barnard* the only point discussed was, whether the false representation there made was a representation concerning or relating to the credit and ability of the party whose position was misrepresented, so as to come within the sixth section of Lord *Tenterden*'s act. (*d*) *The Tunbridge Dipper's* case was the case of an invasion of a previously existing right. *Blofield* v. *Payne* was a case of the same nature. *Littledale* J. there says (*e*), "The act of the defendants was a fraud upon the plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, *an injury to his right.*" It is not denied that the invasion of an existing right, is sufficient to support an action, without proof of special damage. In *Marzetti* v. *Williams* the action was, not for a tort, but for a breach of contract. [*Tindal* C. J. Does not the case range itself in that class of cases, where actions have been held to be maintainable for false and fraudulent representations, whereby the plaintiff was induced to do

(*a*) *Quære.* Many things, cured by verdict, are not cured by pleading over.

(*b*) 3 *New Cases*, 334., 3 *Scott*, 699.

(*c*) *Tyrwh. & G.* 1033., 1 *M. & W.* 704., 5 *Dowl. P. C.* 281.

(*d*) 9 *G.* 4. *c.* 14.

(*e*) 4 *B. & Ad.* 411.

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an act by which he is injured, as *Pasley* v. *Freeman* ? (*a*)] *Turner* v. *Leicester* was a case of implied warranty on a sale. But in actions for *torts* both *damnum et injuriâ* must appear on the face of the declaration. It is sufficient if the plea may, by a fair construction, be applied to the damage alleged in the declaration. The declaration in this case does not allege that the bonuses were not actually made. It contains no allegation that the statements of the defendant were, in that respect, untrue. It merely alleges that, *with reference to the conditions contained in the deed of settlement*, the bonuses were improperly and fraudulently made. Where special damage is the gist of the action it may be traversed; *Perring* v. *Harris*. (*b*) [*Maule* J. I do not apprehend that it is denied, that an allegation of special damage may be traversed. *Tindal* C. J. If the secretary had answered the plaintiff's inquiries agreeably to the fact, would the insurance have been effected?] Yes. [*Tindal* C. J. I think not. *Coltman* J. You answer the allegation of damage only argumentatively. *Maule* J. The plea does not even aver that the policy effected by the plaintiff is secure. It may not be equally secure, and may be of different value, by reason of the falsehood of the representations. Can it be said that the statement in the declaration, that the policy is of less value, is traversed, by an allegation, that so much has been done as was necessary for the security of the in-

(*a*) 3 *T. R.* 51., 2 *Smith's Lead. Cas.* 55. See also *Eyre* v. *Dunsford*, 1 *East*, 318.; *Haycraft* v. *Creasy*, 2 *East*, 92.; *Tapp* v. *Lee*, 3 *B. & P.* 367.; *Hamar* v. *Alexander*, 2 *N. R.* 241.; *Hutchinson* v. *Bell*, 1 *Taunt.* 558.; *Jones* v. *Bowden*, 4 *Taunt.* 847.; *Gilbert* v. *Stanislaus*, 3 *Price*, 54.; *Ames* v. *Milward*, 2 *B. Moore*, 714.; *Dobell* v. *Stevens*, 3 *B. & C.* 623., 5 *D. & R.* 490.; *Foster* v. *Charles*, 6 *Bingh.* 396., 7 *Bingh.* 105., 4 *M. & P.* 61. 741.; *Polhill* v. *Walter*, 3 *B. & Adol.* 114.; *Haslock* v. *Fergusson*, 7 *A. & E.* 86., 2 *N. & P.* 269.; *Swann* v. *Phillipps*, 8 *A. & E.* 457., 3 *N. & P.* 447.

(*b*) 2 *M. & Rob.* 5.

surance? *Erskine* J. The object of parties, in insuring in one office rather than in another, is, generally, the obtaining of some collateral advantage, and not merely increase of security.] The declaration does not disclose sufficient damage to support an action. [*Maule* J. Suppose that, upon the sale of a horse, the representations were, that the horse had two eyes, when in fact he had but one, would it not be sufficient to aver — that the horse was of less value, without stating how that defect lessened the value of the horse? *Tindal* C. J. This case appears to range itself within the class of cases in which it has been held, that facts lying peculiarly within the knowledge of the other party need not be alleged with much particularity.]

TINDAL C. J. The opinion of the court has been expressed as the case proceeded.

Judgment for the plaintiff. (*a*)

(*a*) And see *Shrewsbury* v. *Blount*, *antè*, Vol. II. p. 475., 2 *Scott*, *N. R.* 588.

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May 24. BRANCKER and Another, Assignees of C. HUMBERSTON and S. FRODSHAM, Bankrupts, *v.* EDWARD MOLYNEUX.

The ownership of goods laden on board a general ship, is, *primâ facie*, in the party who was possessed of the ship at the time that the goods were received on board.

THE rule for a new trial in this case (*a*) having been made absolute, the cause came on for trial before *Rolfe* B., at the summer assizes at *Liverpool*, 1840, when the same evidence, in substance, was given as on the former trial; to which the plaintiffs sought to add two letters, written by *T. B. Molyneux* to the bankrupts from *Charlestown*, and received by them at the time of the arrival of the *Diamond*, for the purpose of shewing that the cotton had been shipped on account of the bankrupts. The letters were rejected, on the ground that it had not been proved that *T. B. Molyneux*, when he wrote those letters, was the agent of the bankrupts. The defendant, on this occasion, contended that the plaintiffs had not established their possession of the cargo. The learned judge being of that opinion, directed a verdict to be entered upon the first, second, and fourth issues, for the plaintiffs; on the third, for the defendant.

In *Michaelmas* term following, *Wilde* Solicitor-General moved for a new trial, on the ground of the improper rejection of evidence; and also for misdirection. The corporal possession of the ship and cargo was in the captain, but he held the cargo as agent for the owners of the cargo. The possession of the bill of lading was *primâ facie* evidence of ownership of the cotton. The conversion proved consisted in the defendant's coming on board with a number of men, and taking possession

(*a*) *Antè*, Vol. I. 710., 1 *Scott, N. R.* 553.

of the cotton. At the time of the conversion, therefore, the cotton was in the possession of the plaintiffs. A rule nisi having been granted,

Channell Serjt. now shewed cause. The letters were not offered in evidence for the purpose of shewing an act done, but merely as containing an acknowledgment of the bankrupts' title, on the part of *T. B. Molyneux.* The bill of lading itself was evidence only on the ground that it was part of the transaction, and, therefore, even with respect to the bill of lading, the document to be received in evidence, was that part of the bill of lading which had been delivered out. [*Maule* J. The letters were received on the arrival of the *Diamond.*] But for the 6 *G.* 4. *c.* 110. *s.* 45., and the 3 & 4 *W.* 4. *c.* 55. *s.* 42., the mortgagee would be regarded as owner of the ship; and the owner of the ship would be, *primâ facie*, owner of the cargo. [*Maule* J. The enactments referred to were made for the benefit of mortgagees.] Naked possession is not sufficient as against mortgagees.

Wilde Solicitor-General, in support of the rule. It certainly was, at one time, considered that the mortgagee was liable upon the contracts of the owner for the use of the ship. It is only surprising that it should have been so considered,—any more than that the owner of the cargo should be considered liable upon such contracts. A mortgagee is not liable upon the contract of the mortgagor, and is not entitled to the benefit of such contract. An exception arises where the mortgagee steps in before the voyage is performed. If he takes possession of the ship before the contract, in respect of which the freight is earned, is completed, and performs that contract, he becomes entitled to receive the freight. [*Maule* J. If he takes possession of the ship, how can he avoid taking possession of the cargo?] This was not a case of taking

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possession of the cargo as a consequence of taking possession of the ship; the cargo was taken possession of at a subsequent period. [*Tindal* C. J. The only question before us is, whether the title of the plaintiffs was made out at the trial, so as to support the affirmative of the third issue. *Maule* J. There would be no difficulty if it was shewn that this was the cotton shipped for the bankrupts.] The case was so presented at the court by Mr. *Cowling;* and it was on that ground that the letters were conceived to be admissible in evidence. The fact, however, was shewn by the bill of lading, which was ample proof of title against a wrong-doer.

TINDAL C. J. I see no ground for the position that any property in the cotton vested in the defendant. The only title set up by him was a mortgage of the *ship.* The only question is, in whom the property is, *primâ facie.* The party who is owner of the ship at the time that the cargo is put on board is, *primâ facie,* owner of the cargo. Here, the *Diamond* was, at the time of the shipping of the cargo, in the possession of the bankrupts. At all events they would be entitled to hold the possession, as *carriers.* It lies upon the defendant to shew a better title. This case ought to go down again.

COLTMAN J. A sufficient *primâ facie* case was shewn to entitle the plaintiffs to a verdict upon the third issue.

ERSKINE J. The only ground upon which the defendant could justify the taking of the cotton would be, that it belonged to some person or persons other than the owners of the ship; and that he, the defendant, was entitled to detain the cotton as security for the freight. (*a*)

(*a*) Even this defence would appear to require a different plea from any which is now on the record.

MAULE J. The cotton having found its way on board a ship of which the bankrupts were in possession, and no title being shewn in any other person, I think that the verdict, which the jury were directed to find for the defendant, should have been found for the plaintiffs.

Rule absolute.

Doe dem. GIBBARD *v.* ROE.

May 25.

Service of a declaration in ejectment upon a lunatic in an asylum was held to be sufficient. After several unsuccessful attempts to effect personal service, a declaration in ejectment was left with the tenant's daughter on the 21st of *May*, the day before the term. A letter from the tenant's attorney, dated the 24th, was received on the 25th by the attorneys of the lessor of the plaintiff, stating that the tenant had put the declaration into his hands: Held, sufficient to raise a presumption that the declaration reached the tenant on the 21st; and that the service was sufficient.

SHEE Serjt. moved for judgment against the casual ejector. The premises were in the possession of two tenants, one of whom, Mrs. *Moss*, was a lunatic, and was in an asylum. No committee having been appointed, she was personally served in the asylum with a copy of the declaration, a copy having also been served on her servant upon the premises. [*Tindal* C. J. That is sufficient.] With respect to the other tenant, the affidavits stated repeated unsuccessful attempts to effect personal service upon him, and that on the 21st of *May* (the day before the term), a copy of the declaration was left with his clerk at his office, upon the premises in dispute; and also that the declaration and notice were, on the same day, served at his residence, by delivering a copy thereof to his daughter, to whom they were read over and explained.

It appeared by a further affidavit, that the attorneys for the lessor of the plaintiff had on the following day received a letter from the tenant's attorney, dated the 24th (*a*) of *May*, stating that the tenant had put the

(*a*) In *Doe dem. Emsley* v. *Roe, antè*, Vol. I. p. 840., it was held not to be sufficient that the declaration served on

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declaration into his hands, and offering to let judgment go by default if the tenant were allowed to continue in his offices.

Tindal C. J. Putting all the circumstances together, it seems to me that the affidavits disclose reasonable ground for supposing that the declaration came to the tenant's hands on the 21st, the day before the term.

Rule granted.

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a member of the family of the tenant in possession came into the hands of such tenant before the first day of the term, unless *evidence*, that the declaration had so reached the hands of the tenant, was in the possession of the lessor of the plaintiff early enough to enable him to move for judgment on the first day of term. No previous case had, it is believed, gone to that extent. *Doe dem. Emsley* v. *Roe* appears to be now virtually overruled by the decision in the principal case.

Had the letter been written and sent on the twenty-*first* of *May* (see 9 *Dowl. P. C.* 844.), it *might* have been received in time to give the lessor of the plaintiff the power of moving for judgment on the first day of term; the existence of which power was considered necessary in *Doe dem. Emsley* v. *Roe*.

May 26.

Martinez and Another *v.* Gerber.

Case, *per quod servitium amisit*, may be maintained by the master, although the injury done to the servant was not direct, but consequential, and the servant could not have maintained an action of trespass for such injury, but must have sued in case.

In case *per quod servitium amisit*, a general allegation of service is sufficient, without stating that the servant was hired, or that he was to receive a salary.

Case. The first count of the declaration stated, that one *Goss*, before and at the time, &c. was, *and from thence hitherto had continued and still was*, the servant and traveller of the plaintiffs; and that *Goss* on, &c. was possessed of a certain phaeton, and of a certain horse then drawing the same, and in which phaeton

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Goss was then riding along a highway; and the defendant was also then possessed of a gig and horse, then under his care and management, proceeding along the said highway; and that the defendant so carelessly, negligently, and improperly drove his said gig and horse, that, by the carelessness, &c. of the defendant, the said gig then ran and struck with great violence against the said phaeton; * and thereby *Goss* was then thrown with great violence out of his said phaeton upon the ground there; and by means of the premises, *Goss* was then greatly bruised, and became and was sick, disabled, and unable to attend to the necessary business of the plaintiffs, about which he was employed at the time, &c., and so remained from thence hitherto; during all which time, by reason of the premises, the plaintiffs lost the service of *Goss*, and all advantage which otherwise would have accrued to them from such service: and also, by reason thereof, the plaintiffs were obliged to employ, and did necessarily employ, one *Gassiot*, during the period aforesaid, as their traveller and servant instead of *Goss*, and became liable to pay, and did afterwards, to wit, on, &c. necessarily pay, to *Gassiot* a large sum of money, to wit, 200*l.*, for the expenses and wages of *Gassiot* as such traveller and servant during the period aforesaid.

The second count, — after stating the horse of the defendant to be of a vicious and unmanageable temper and disposition, insomuch that the last-mentioned horse, by reason of its said vicious and unmanageable temper and disposition, could not be driven in the said gig along the said highway without great danger to all the liege subjects of our lady the Queen, then travelling in carriages or on foot along the same, as he the defendant before and at the time of the committing, &c. well knew, — alleged that the defendant, well knowing the premises, on, &c. wrongfully caused the last-men-

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tioned horse to be put and harnessed to the said gig, and then wrongfully and injuriously drove the same, being so put and harnessed to the said gig, along the said highway, in and along which *Goss* was so riding as last aforesaid; by reason whereof, and of the vicious and unmanageable temper and disposition of the last-mentioned horse of the defendant becoming unmanageable while drawing the said gig as aforesaid, the said gig then ran and struck with great force and violence against the said phaeton; and thereby, &c. as in the first count, from the *.

Pleas: to the first count, not guilty; secondly, to the second count, that the said horse of the defendant was not of a vicious and unmanageable temper and disposition, whereby the said horse could not be driven in the said gig along the said highway without great danger to all the liege subjects of our said lady the Queen, then travelling, with carriages or on foot, along the same, *modo et formâ;* concluding to the country; thirdly, to the second count, that the defendant did not know that the said horse of him the defendant was of a vicious and unmanageable temper and disposition, whereby the said horse could not, &c. (as in the last plea).

Upon these pleas the plaintiffs joined issue.

The cause was tried before *Tindal* C. J., at *Guildhall*, after *Easter* term last; when a verdict was found for the plaintiffs, upon all the issues; damages, 63*l.*

Channell Serjt. now moved in arrest of judgment. Where a servant can maintain trespass, or where, as in a case of seduction, the servant has no right of action, a master may maintain an action on the case for the loss of service; but where, as here, the remedy of the servant is in case, it is submitted that the master cannot support any action, the injury being too remote, inasmuch as it is a consequence upon a consequence. [*Maule* J. The injury to the servant and that to the

master are *collateral* to each other, and not consequent upon one another.] The injury to the master is the consequence of the damage suffered by the servant. [*Maule* J. A servant without any regular engagement might recover damages both in respect of personal injuries caused by the wrongful act of the defendant, and also for the loss arising from inability to work and thereby to earn wages. So far as regards the disability to work, the master stands in the same situation as the servant.] Secondly, the declaration is defective in not stating that *Goss* was employed by the plaintiffs at a yearly salary, or that they were bound to pay, or that they did, in point of fact, pay him any salary.

TINDAL C. J. It seems to me that there is no ground for the distinction which has been suggested. In this case the defendant has committed a wrongful act, from which two consequences have resulted, the one to the masters and the other to the servant. It is admitted that if the defendant had *wilfully* driven against the carriage containing the plaintiffs' servant, this action might be maintained; but it is contended, that inasmuch as under the circumstances of the present case the servant could only have sued in case for the consequential damage done to him, his employers have no remedy, the injury sustained by them being too remote. I am not aware of any reason why the masters should be without remedy merely from the circumstance, that the remedy of the servant is by an action on the case, and not by an action of trespass. With respect to the other point, the declaration alleges that *Goss* was, and still is, the plaintiffs' servant, which is sufficient. There was no necessity to state that he was hired at any wages or salary. (*a*)

(*a*) The damage would be the *same* whether the services of the disabled servant were gratuitous or paid for, suppos-

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COLTMAN J. A loss has resulted to the plaintiffs by the wrongful act of the defendant. There having been *damnum et injuria*, the plaintiffs are entitled to redress.

ERSKINE J. The distinction relied on for the defendant appears to me to be a mere verbal distinction, founded upon no principle.

MAULE J. concurred.

Rule refused. (*a*)

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ing the masters to be obliged to *hire* another, or to do the work themselves, or to leave it undone. The allegation that *Goss was and still is* the plaintiffs' servant, shews that whilst paying *Gassiot*, they were *entitled* to the services of *Goss*.

(*a*) In the *Reg. Brev.* 95 *a.* is a writ for a master: "Quare vi et armis mansum ipsius *A.* apud *H.* obsederunt, et homines et servientes suos, extra mansum prædictum existentes, idem mansum, ad servitium et commodum ipsius *A.* inibi faciendum, ingredi, et quosdam alios homines et servientes suos, inibi existentes, mansum prædictum, ad terram ejusdem *A.* excolendum, et ad alia negotia ibidem facienda, exire, non permiserunt; per quod, &c." And see *F. N. B.* 87 N.

May 28.

KNIGHT and Others *v.* SELBY.

By a will (made before 1838), the testator devised as follows: — "As to my messuages, lands, and tenements, and real estate, I dispose thereof as follows: I give and devise *Whiteacre* unto *A.* and *B.* and their heirs, for the use of *C.* for life, and after her decease, to the use of *D.* and *E.*, as tenants in common:" Held, that *D.* and *E.* took a fee.

DEBT, for 66*l.* 13*s.* 3*d.*, claimed as rent due, in respect of the share of the late *Henry Knight*, of *Otford* castle and farm, at *Otford*, in *Kent*.

Plea: nunquam indebitatus.

The following case was stated, under a judge's order, for the opinion of the court: —

Robert Parker, being seised of freehold and copyhold

land, and possessed of leasehold estates, by his will, duly executed, bearing date the 24th of *June* 1829, after directing the payment of debts, and bequeathing to his wife 60,000*l.* consols, and to other persons certain specific and pecuniary legacies, gave and bequeathed as follows: — "Also I give and bequeath unto Sir *Timothy Shelley*, Bart., and Sir *John Shelley Sidney*, Bart., all the rest and residue of my ready money, securities for money, and moneys in the funds, upon trust to invest the same in their joint names, and to pay to my wife *Helen*, or permit and suffer her, or her agent for her use, to receive, the dividends or interest of the same during her life; and after her decease, upon this further trust, to divide, transfer, and pay the said stocks and moneys unto and amongst my cousins, *Thomas Marchant*, *John Marchant*, and the children of my late cousin *William Marchant*, and the children of my late cousin *Mary Knight*, viz. one equal share to *T. M.*, one equal share to *J. M.*, one equal share unto and amongst the children of *W. M.*, and the remaining share unto and amongst the children of *Mary Knight*; the share of such child or children as shall be under the age of twenty-one, when the same shall become transmissible by the decease of my wife, shall be paid into the hands of the natural parent, or next of kin, or guardian appointed, as the case may be." And after directing that the receipt or release of the legatees should be a sufficient discharge to his trustees, and that they should not be accountable for any more of his personal estate than should come to their respective hands, he proceeded: — "As to my messuages, lands, tenements, and real estate, I do dispose thereof as follows: I give and devise unto the said Sir *Timothy Shelley* and Sir *John Shelley Sidney*, and their heirs, all those my two third parts or shares, and all other my right and interest, in and to all those messuages, lands, and tenements

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situate at *Ifield*, in the county of *Sussex*; also in and to all that messuage, lands, and tenements in *Charlewood*, in the county of *Surrey*, with every of their appurtenances, either in the same or in any other parishes, situate and called or known by the name of *Westfield*, or by whatsover other name called or known; *also all that my manor or royalty, messuages, lands, tenements, and hereditaments, and castle, situate at* Otford, *in the county of* Kent, *with all appurtenances, now in the occupation of T. S.*; also all that messuage and farm, and lands, with the appurtenances, in *Chevington*, in the county of *Suffolk*; also my farm and lands in *Hergrave* and *Hessell*, in *Suffolk*; also in *Hoo*, in the county of *Kent*; in *Ifield*, in the county of *Sussex*; in *Charlewood*, in *Surrey*; also my house in *Catharine Place*, *Bath*; and all other my messuages, lands, tenements, and hereditaments, not herein particularly mentioned, — upon the following trusts: first, for the use of my wife *Helen*, for her life, and after her decease, to the use of the said *T. M.* and *J. M.*, and the children of the said *W. M.* and *Mary Knight*, in equal shares and proportions, as tenants in common." The testator further bequeathed to his said wife, absolutely, certain other personal property in these words: "All my jewels, plate, linen, china, carriage, wines, and other goods, chattels, and effects whatsoever;" and appointed her sole executrix.

Robert Parker died on the 27th of *March* 1837. *Helen Parker* survived her husband, and died on the 30th of *May* 1838. *Mary Knight* and *William Marchant* were both dead at the time the will was made. There were five children of *Mary Knight* living at the time of the death of the testator, viz. *Thomas Knight*, *William Knight*, *Richard Knight*, *Mary* the wife of *Stephen Grantham*, and *Henry Knight*. *Henry Knight* died on the 24th of *July* 1837, in the lifetime of *Helen Parker*.

The plaintiffs, *Thomas Knight*, *William Knight*, *Richard Knight*, and *Stephen Grantham*, are now entitled to

the said *Henry Knight's* share of the real estates of the testator, provided the said *Henry Knight* took in fee under the will. The defendant has been for many years past a tenant of *Otford* castle and farm, and paid rent in respect of the said estate, as such tenant, to the testator in his lifetime and to his widow; and since her death, and the death of the said *Henry Knight*, he has made two several payments on account of the rent due in respect of the share, late of the said *Henry Knight*, to the plaintiffs, but in the absence of all knowledge as to the rights of the parties claiming such rent.

The question for the opinion of the court is, whether the devisees in remainder, after the estate for life devised to the testator's wife *Helen* in the real estates of the testator, took estates in fee or for life only, under the said will. If the court shall be of opinion that they took estates in fee, then the defendant agrees that a verdict and judgment shall be entered for the plaintiffs, for 66*l.* 19*s.* 3*d.* and costs.

But if the court shall be of opinion that the devisees in remainder took estates for life only, then the plaintiffs agree that a judgment shall be entered against them, of *nolle prosequi*, immediately after the decision of the case, or otherwise, as the court may think fit.

Channell Serjt., for the plaintiffs. The devisees took the fee notwithstanding the absence of words of inheritance. The testator states his intention to dispose of his "messuages, lands, tenements, and real *estate*." The term used is "estate" not "estates." The former word has been considered sufficient to carry the fee, except where from the context it appeared that the word was used in the same sense as "estates," by which latter term, particular property, not the interest of the testator therein, will be understood; *Gall* v. *Esdaile*. (*a*)

(*a*) 8 *Bingh.* 323., 1 *M.* & *Scott*, 466.; and see *Doe dem. Lean* v. *Lean*, 1 *A.* & *E. N. S.* 229.

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[*Tindal* C. J. Has not that been decided otherwise in Chancery?] That was before *Gale* v. *Esdaile*. In *Doe dem. Penwarden* v. *Gilbert* (*a*) the words "estate and effects" were held sufficient to pass the fee. That is a case directly in point. There is indeed this difference in the two cases, that here the devise is to trustees and their heirs; which appears to make this case rather stronger than *Doe dem. Penwarden* v. *Gilbert*, as the devise to the trustees *and their heirs* shews in what sense the word "estate" is used. *Challenger* v. *Sheppard* (*b*) would be directly in point, except that there counsel went on to take another ground; and as the court only certified their opinion to the Lord Chancellor, the grounds upon which that opinion was formed do not appear. The case was, however, argued principally on the first point; and that alone is noticed by the reporter in the marginal note. So, where a tenant in common in fee devised her property as "my *share* of &c.," it was held that the devisee took a fee; *Paris* v. *Miller* (*c*). In *Doe dem. Knott* v. *Lawton* (*d*), *Tindal* C. J., in delivering the judgment of the court, says, "The word 'estate' in a will has been held, in a series of cases at once so numerous and so uniform, to extend to the *quantity* of interest which the testator has in the land devised, that the general rule is laid down, that it shall carry a fee, unless the intention is broken in upon, by other expressions in the will clearly shewing that it is intended to give it a more limited construction." (*e*)

Talfourd Serjt., *contrà*. The devisees in remainder took an estate for life only. It has been conceded, that unless a manifest intention appears upon the face of the

(*a*) 3 *Bro. & B.* 85., 6 *B. Moore*, 268.
(*b*) 8 *T. R.* 597.
(*c*) 5 *M. & Selw.* 408.
(*d*) 4 *N. C.* 455., 6 *Scott*, 303.
(*e*) 4 *N. C.* 461.

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will, the devisees will take an estate for life only. It must also be conceded that the word "estate" in the introductory part of the will, has not the effect of controlling the subsequent devise; *Doe dem. Child* v. *Wright.* (*a*), *Goodright dem. Drewry* v. *Barron* (*b*), *Doe dem. Small* v. *Allen.* (*c*) [*Maule* J. The parties who claim by devise must make out the affirmative. (*d*)] In *Challenger* v. *Sheppard* it is quite uncertain upon what ground the certificate proceeded. In *Roe dem. Bowes* v. *Blackett* (*e*), Lord *Mansfield* C. J. said, that if the intention to give a fee was problematical, the rule of law (*g*) must take its course. The cases go no further than this,—that if the word "estate" is found *in the devise itself*, it is sufficient to pass the fee.

Channell Serjt., in reply. It may be admitted that this case is not so strong as those in which the word "estate" occurs in the devising part of the instrument; but enough appears to shew, that the words in the introductory part of the will, ought to be considered as pointing out the meaning of the words used in the devising part.

TINDAL C. J. The question here is, whether, though the artificial words for creating a fee are not to be found, enough appears on the face of the will, to shew an intention on the part of the testator, that the fee should pass. I think I can see sufficient evidence of an intention that the devisees in remainder should take in fee. The introductory words are, "As to my messuages, lands, tenements, and *real estate*, I dispose

(*a*) 8 *T. R.* 64.
(*b*) 11 *East*, 220.
(*c*) 8 *T. R.* 497.
(*d*) To this extent only does the trivial expression,—"that the heir-at-law cannot be disinherited except by express words," (though often put forward as a positive and substantive rule of law,) appear to be true. *Vide* 4 *Mann. & Ryl.* 71. (*d*), note to *King* v. *Ringstead.*
(*e*) *Cowp.* 235.
(*g*) *Vide suprà*, note (*d*).

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thereof as follows." I cannot think that these are mere idle words. When the testator couples "messuages, lands, and tenements" with "real estate," he means something beyond that which would pass by the former words alone; he means to dispose of the whole of his interest. He afterwards, after particularising certain estates, speaks of "all other my messuages, lands, tenements, and hereditaments." There is, moreover, an express devise to trustees and their heirs, independently of any evidence of intention arising out of the use of the term "real estate." He gave a fee where there was no necessity; as the persons designated as trustees take no estate under the will. It seems, therefore, as if by these words it was intended to give the fee to the parties themselves. This case cannot, I think, be distinguished from *Challenger* v. *Sheppard*, where it must be taken to have been held that where an estate in fee is devised to trustees upon trust after a certain event, to permit and suffer *A. B.* to enter and enjoy the whole, without any other limitation as to the interest of *A. B.*, *A. B.* takes the beneficial interest in fee; for I do not feel the force of the second ground put by the counsel for the plaintiff in *Challenger* v. *Sheppard*. (*a*) The certificate would doubtless proceed on the broad ground, that the general words were not restrained by any expressions indicating an intention that a less estate than a fee should pass to *A. B.* I think the plaintiff is entitled to judgment for the 66*l.* 13*s.* 3*d.*

COLTMAN J. The introductory words not being immediately connected with the premises devised, I think it is not conclusively shewn, that by using them, the remainder in fee was intended to be devised. Still, it is a

(*a*) *Gibbs*, of counsel with the defendant, does not appear to have considered it necessary to notice, in his reply, the second point taken by *Best* Serjt. for the plaintiff.

circumstance from which other facts tending to shew an intention to give the fee may derive confirmation; as Lord *Ellenborough* observes in *Goodright* v. *Barrow*, "With respect to the introductory words, it has been held in many cases that they are not sufficient of themselves to carry a fee, but *juncta juvant*." (*a*) Giving the land to trustees *and their heirs* is strong to shew that cetteux que trust were to take the same interest. That was the ground upon which *Challenger* v. *Sheppard* was decided.

ERSKINE J. I am of the same opinion. The cases cited clearly shew that words found in the introductory part of the will are not, of themselves, sufficient to carry the fee under a subsequent general devise. Although they indicate an *intention* to dispose of the fee, that intention may not have been carried into effect. Taking however the whole of this will together, the testator has shewn an intention to dispose of all his interest, and that the devisees in remainder should take a fee. It would have been useless to give the estate to the trustees *and their heirs* except for the purpose of passing the whole fee to the beneficial devisees.

MAULE J. I also think that the plaintiffs are entitled to recover the rent. A case not unlike the present came lately before the court of Exchequer. (*b*) The words in the introductory part of this will, indicate an intention to use words in a subsequent part of the will which should operate as a devise of the fee. Still, the intimation of an intention to devise a fee will not, of itself, enlarge a general devise into a fee. But the preliminary clause throws light upon terms used in the devising clause, which otherwise might be doubtful.

(*a*) 11 *East*, 223.

(*b*) In *Doe dem. Roberts* v. *Roberts*, 7 *M. & W.* 382.

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To understand the meaning of a particular clause, we ought to look at the words which occur both before and after. Here, the word "heirs" in the introductory part of the will imports absolute ownership. In the subsequent parts of the will the testator appears to assume that he has sufficiently expressed his intention to pass that absolute ownership; and the will is silent as to the extent of interest which the beneficial devisees in remainder are to take. I think that the intention to pass the fee, intimated in the introductory part of the will, is sufficiently, though not technically, brought down to the beneficial devisees.

Judgment for the plaintiff.

May 25.

MILGATE *v.* KEBBLE.

Goods are sold to be paid for by instalments, the balance to be paid before removal. The vendor allows the vendee to place the goods under lock and key upon the vendor's premises, and delivers the key to the vendee, but retains the key of the external inclosure. The balance being unpaid, the vendee has not such a possession as will entitle him to maintain trover against the vendor upon a wrongful removal and sale of the goods.

TROVER, for the value of 100 bushels of apples. Pleas: first, not guilty; secondly, that the plaintiff was not possessed.

At the trial before Lord *Abinger* C. B., at the *Maidstone* summer assizes, 1840, the plaintiff put in an agreement in writing, whereby the defendant, on the 11th of *September* 1839, sold all his fruit at &c., for 38*l.* to the plaintiff, who was to pay 10*l.* on the following *Monday*, 10*l.* on the *Monday* after, and the remainder before he took any of the apples off the premises. The plaintiff paid 33*l.* before the 1st of *October*, on which day he gathered the apples, and, by the defendant's permission, placed them in a kiln in the defendant's outhouse. The defendant kept the key of

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the outhouse, but delivered the key of the kiln to the plaintiff. On the 27th of *December* the defendant gave the plaintiff a written notice to pay for the apples and take them away. This not being done, the defendant resold the apples on the 22d of *January* for 6*l.*, which, it was insisted on the part of the plaintiff, the defendant had no right to do, it not being shewn that he had waited a reasonable time after the plaintiff was *in morâ*. For the defendant, it was contended, that sufficient time had elapsed; and it was submitted that, even supposing the sale to have taken place too soon, the second issue must be found against the plaintiff, as he had neither actual possession nor the right of possession. Lord *Abinger* C. B. left it to the jury to say, whether a reasonable time had elapsed, after the stipulated day of payment, before the defendant resorted to the measure of reselling the apples. The jury found that a reasonable time had not elapsed, and returned a verdict for the plaintiff, damages 5*l.* Leave was reserved to move for a nonsuit.

In *Michaelmas* term, 1840, *Channell* Serjt. moved accordingly, and referred to *Bloxam* v. *Sanders* (*a*) and *Wilmshurst* v. *Bowker*. (*b*) A rule nisi being granted,

Talfourd Serjt. now shewed cause. The plaintiff might have been entitled to complain as to the correctness in point of law, of leaving it as a question to the jury, whether a reasonable time had elapsed. That, however, is not now material, the jury having found the fact against the defendant. However that may be, the plaintiff was entitled to the verdict. The only question here is, whether the plaintiff had such a property in the apples, and such a right of possession, as would enable

(*a*) 4 *B. & C.* 941., 7 *D. & R.* 396.

(*b*) 5 *N. C.* 541., 7 *Scott*, 561., on demurrer; *antè*, Vol. II. 792., 3 *Scott, N. R.* 272., on motion for judgment *non obstante veredicto*. A writ of error was afterwards brought.

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him to maintain trover; a question entirely beside the cases which were cited when this rule was moved for. This is not the case of a vendor claiming a lien upon goods remaining in his possession, as in *Bloxam* v. *Sanders*. Here, the plaintiff had not only acquired the property (*a*) and the right of possession; he had also the actual possession. The apples were under his lock and key, with the assent, and by the very act, of the defendant himself. He had such a possession as would have enabled him to maintain trespass or trover against a third party; and, consequently, he may sue the defendant. *Wilmshurst* v. *Bowker*, therefore, does not apply. The court will not say that the defendant had a right to enter the kiln. [*Erskine* J. It would be no *conversion* if the defendant was entitled to retain the apples.]

Channell Serjt., *contrà*. To support the issue, the plaintiff was bound to prove property in himself, and an immediate right of possession. Where specific goods are sold, as here, the property passes to the vendee by the sale, but he has no right to the possession until the price is paid, unless credit is given. In *Bloxam* v. *Sanders* *Bayley* J. says, "The seller's right in respect of the price, is not a mere *lien* which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion; and payment or tender of the price is a condition precedent on the buyer's part; and until he makes such payment or tender, he has no right to the possession."

(*a*) By the modern law of *England*, not only the risk (*periculum rei venditæ*) but the property in goods sold is changed by the bargain, without delivery; and this deviation from the civil law, which appears to have been occasioned by inadvertence in assuming that the property and the risk are inseparable, though clearly distinguished in the civil law, has been adopted (as well as the English law of stoppage *in transitu*; 2 *N.* & *M.* 650. (*c*)) in *France*. *Code Civil*, No. 1583.

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TINDAL C. J. The only question is, whether the plaintiff was lawfully possessed of the apples at the time that they were taken by the defendant.

It is quite clear, upon the whole of the facts, that the plaintiff was not entitled to remove the apples till the price had been paid. Does this differ from the ordinary case where goods are pledged? The pledger is not in a condition to bring trover. That is the situation in which the plaintiff stands. I think the circumstance of the plaintiff having the key of the kiln, whilst the defendant retained the key of the external inclosure, was immaterial. It was no more than if the defendant had given the plaintiff the key in order that he might look at the apples. I think the verdict on this plea should have been for the defendant.

COLTMAN J. It was never the intention of the defendant to part with his lien upon the property. The apples were placed in the kiln in order to satisfy the plaintiff that he would have the *same* articles. As the defendant retained the outer key, he cannot be considered as having abandoned his right to hold the goods until the residue of the price was paid. It was an arrangement which is frequently adopted. The case is brought within *Bloxam* v. *Sanders*.

ERSKINE J. I am of the same opinion. Under a plea of "not possessed" in trover, the plaintiff must prove actual possession, or a right of immediate possession. Here, it is conceded that there was no right of immediate possession. Did the plaintiff prove *actual* possession? It was contended that he had such possession, as he had the key of the kiln in which the apples were deposited. But the key of the place by which the kiln was surrounded was in the possession of the defendant. The question is, whether the defendant intended to give

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possession to the plaintiff, or merely to secure the plaintiff against the removal of the goods purchased, or the substitution of others of an inferior description. The latter appears to be the only reasonable construction to be put upon the acts of the parties. The plaintiff, therefore, having neither actual possession, nor the right of immediate possession, though he had the right of property, the issue ought to have been found for the defendant.

MAULE J. This case is governed by *Bloxam* v. *Sanders*, if the apples were in the possession of the defendant. But, it is said that here the plaintiff had actual possession. It is possible to suppose a state of things in which the plaintiff had obtained possession subject to a right in the defendant to put an end to that possession in the event of non-payment. No such state of things, however, appears to exist here. The evidence appears to me to shew that the defendant was in possession of the apples, subject to a power on the part of the plaintiff to prevent the property from being removed. (*a*) As the plaintiff was not, I think, in possession, the case comes within *Bloxam* v. *Sanders*, a decision which ought not to be disturbed.

Talfourd Serjt. prayed that instead of a nonsuit, a verdict might be entered for the plaintiff, on the first issue, and for the defendant, on the second.

Rule absolute accordingly. (*b*)

(*a*) A course frequently pursued in other trades.

(*b*) And see *Martindale* v. *Smith*, 1 *A. & E. N. S.* 389.

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RICHARD DUNN *v.* SALVATORE DI NUOVO.

June 4.

Debt for 163*l.* 16*s.* for fifty-two weeks' rent on a parol demise for twelve months, from 25th of *February* 1839 (*Monday*), at 3*l.* 3*s.* per week. Plea, as to so much of the rent as accrued due before and on the 27th of *July* 1839 (*Saturday*), payment and acceptance in satisfaction. Held bad on special demurrer, as no weekly rent could have become due on the latter day, and no apportionment of the rent for the fraction of a week was shewn.

In debt upon a parol demise (*a*), plea, that during the term, it was agreed that the defendant should relinquish the possession to the plaintiff for a month, after which the possession should be resumed by the defendant; and that the defendant did relinquish the possession, but the plaintiff would not restore the possession. Held bad, as not shewing a surrender or an eviction.

DEBT. The first count of the declaration stated that on the 25th of *February* 1839, by a certain agreement then made by and between the plaintiff and the defendant, the plaintiff agreed to let, and the defendant agreed to take, certain rooms, parcel of a messuage of the plaintiff, at the weekly rent of 3*l.* 3*s.*, with an additional charge of 4*s.* per week for coals, for the term of twelve months from the said 25th of *February*, with option, on the part of the defendant, of giving up the same at any time after the expiration of eight months, but not sooner, and the plaintiff furnishing both linen (for which no extra-charge was to be made for washing), and furniture of the bedroom; that by virtue of this agreement, the defendant then entered into the said rooms, and became and was possessed thereof, and remained and continued so possessed for a long space of time, to wit, for fifty-two weeks, that is to say, from the day and year last aforesaid, until and upon a certain other day, to wit, the 24th of *February* 1840 (*b*), when a large sum of mon[illegible],

(*a*) *Vide post*, 112. (*c*)

(*b*) If the demise was for twelve *lunar* months, the term would have expired on *Monday* the 27th of *January* 1840, and 48 weeks only would be due. If, as notwithstanding the weekly reservation appears to be the true construction (and see *The Queen* v. *Chawton*, 1 *A. & E. N. S.* 247.), the demise was for twelve *calendar*

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to wit, 163*l.* 16*s.* became and was due and payable from the defendant to the plaintiff; *per quod actio accrevit.* Second count, upon an account stated.

The defendant pleaded, secondly, as to so much and such part of the first count of the declaration as related to the nonpayment of so much of the rent claimed in and by the declaration, as accrued due before *and on* the 27th of *July* 1839, and also as to so much and such part of the money mentioned in the last count of the declaration, as equalled the amount of rent in the introductory part of the plea mentioned and referred to—*actio: non*—because on the 27th of *July* 1839, and on divers other days and times between that day and the day of the commencement of the suit, the defendant paid to the plaintiff divers sums of money amounting to the sums of money in the introductory part of the plea mentioned, in full satisfaction and discharge of all cause and causes of action in respect thereof, which payments the plaintiff did then accept, of and from the defendant, in such full satisfaction and discharge. Verification.

The plaintiff demurred to this plea; assigning, amongst other causes, that the part of the count to which the plea is pleaded is not pleaded with sufficient certainty—that the defendant does not shew in and by his plea with sufficient certainty to have much of the rent; the plea is intended to apply that the defendant should have shewn in and by his plea, by a specific allegation in that behalf, the number of weeks in respect of which the rent mentioned in the introductory part of the plea accrued due—that the de-

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months, the term would not expire till the 25th of *February* (*Tuesday*); and, as the action was brought after that day, the declaration ought to have been, not for fifty-two weeks, but for the whole period of the demise—fifty-two weeks and a day.

The sum claimed also omitted the 4*s.* per week for coals.

fendant ought not to have left it to the court to calculate the amount of rent to which the plea was pleaded, or the number of weeks, in respect of which the rent mentioned in the introductory part of the plea accrued due — that in the absence of any specific allegation of the amount of rent to which the plea is pleaded, or of the number of weeks, in respect of which the rent mentioned in the introductory part of the plea accrued due, it is consistent with the plea, that the rent in the introductory part of the plea mentioned might consist, in part, of rent *apportioned*, and which accrued due in respect of the half or other division of a week, and which might be calculated by the defendant at the *rate* of rent per week mentioned in the first count; in which case the apportionment, and the amount thereof, and the circumstances relating thereto, should have been specially alleged — that the plaintiff alleges, that the defendant paid to the plaintiff divers sums of money, amounting, to wit, to the *said* sums of money in the introductory part of the plea mentioned; whereas in the introductory part of the plea there is no mention of any sum of money (*a*), that it alleges that the defendant paid to the plaintiff divers sums of money, amounting to the *said* sums of money in the introductory part of the plea mentioned, while the introductory part of the plea refers only to rent due on the 27th of *July* 1839, without alleging the amount of rent in moneys numbered (*b*), and without alleging the number of weeks in respect of which such rent accrued, and that the plea does not allege the amount of the payments in the plea mentioned in moneys numbered; wherefore it is consistent with the plea that the payments made were of a smaller amount than the rent and damages for the detention thereof, in respect of which the payments are

(*a*) This seems to have been a good ground of demurrer.

(*b*) *Vide* 1 *Vin. Abr.* 238., *Cowell*, voc. *Numerum*.

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alleged to have been made, in which case the payments would constitute an insufficient answer to so much of the plaintiff's demand as the plea is intended to apply to.

Fourth plea, to so much of the rent in the first count alleged to be due, as is claimed to have accrued due, after the 27th of *July* 1839 — *actio: non* — because after the making of the agreement, as in that count mentioned, to wit, on the said 25th of *February* 1839, the defendant, in pursuance thereof, entered upon, and became and was the occupier of, the said rooms, under that agreement, and that he continued and was such occupier thereof for a certain period, to wit, five months then next following, during the whole of which period the defendant regularly paid to the plaintiff, and the plaintiff received and accepted from the defendant, the rent reserved by that agreement; that afterwards and after such last-mentioned occupation, and before any further or other sum had become due or payable from the defendant, in respect of the said rooms, under the said agreement, to wit, on the said 27th of *July* 1839, it was agreed by and between the plaintiff and defendant, that the defendant should quit and deliver up to the plaintiff, and that the plaintiff should take immediate possession of, the said rooms, and should hold, retain, and enjoy the possession thereof, for a certain period, to wit, one calendar month from the date of the last-mentioned agreement; and that in consideration of the defendant's delivering up the possession of the said rooms to the plaintiff for the said period, the defendant should be discharged from all liability to pay any rent for or in respect of the said rooms during the last-mentioned period, and which would otherwise have become due in respect of the same under the agreement in the declaration mentioned; and it was then thereby also agreed between the plaintiff and the defendant, that

after the expiration of the period specified in the agreement in this plea secondly mentioned, during which period the defendant was to quit, and yield up the possession of, the said rooms, as last aforesaid, the defendant should be at liberty to return to and retake possession of, and re-occupy, the said rooms, under the terms of the agreement in the declaration mentioned, and should be at liberty to complete his tenancy thereunder in manner aforesaid; that in pursuance of the agreement in this plea secondly mentioned, the defendant did afterwards, *to wit*, on the day and year last aforesaid, quit and deliver up to the plaintiff at his request, the possession of the said rooms, and did continue out of the possession of the same from thence for one calendar month, according to the agreement in that behalf and at the like request of the plaintiff; and immediately upon and after the expiration of the last-mentioned period, to wit, on the 27th of *August* 1839, the defendant, in further pursuance of his part of the agreement in this plea secondly mentioned, requested the plaintiff to restore and deliver the possession of the said rooms to the defendant, according to the agreement in this plea secondly mentioned, in order that the defendant might complete his said tenancy under the agreement in the declaration mentioned; and that the plaintiff upon being so applied to by the defendant, *refused to deliver to him the defendant the possession of the said rooms according to the agreement in this plea secondly mentioned, and, on the contrary thereof, then retained the possession thereof, and thereby wholly prevented and hindered the defendant from completing his said tenancy under the agreement in the declaration mentioned;* and the plaintiff had from the time when the defendant delivered up the possession of the said rooms hitherto remained in possession thereof, and the defendant had not, at any time since he so quitted the possession of the said rooms, in any

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manner held, occupied, possessed, or enjoyed the same; and the defendant, by means of the premises, became and was and is wholly relieved and discharged from the payment of any rent in respect of the said rooms, for the period subsequent to the giving and delivering up by him of the possession thereof to the plaintiff as aforesaid, to wit, from the said 27th of *July* in this plea before mentioned. Verification.

Special demurrer to this plea, assigning for causes,—amongst others, besides the uncertainty objected to by the demurrer to the second plea, that it does not sufficiently appear in and by the said fourth plea, whether the term in the first count mentioned, was or was not surrendered; and that the matters therein contained should have been pleaded by way of eviction.

Channell Serjt., in support of the demurrer. The second plea is clearly bad, in not stating, with sufficient certainty, to what portion of the declaration it is intended to apply. The defendant should have pleaded the precise portion of the debt demanded, the precise amount of rent it was meant to cover, and the number of weeks in respect of which such rent was due. In *Com. Dig. Pleader* (E. 27.) it is said, "If a plea goes only to *part*, it must ascertain the part of the declaration to which it is applied; as in debt for several years, if the defendant says, *quoad* 20*l.* parcel of the rent, *nil debet*, and does not shew when the rent was due." (*a*) [*Maule* J. Looking at the calendar, of which the courts are bound to take notice, it will be seen, that between the 25th of *February* and the 27th of *July*, there are twenty-five weeks and five days. As the defendant's plea extends to the five odd days, he must, in some way or other, shew how those five days come to be separated

(*a*) For which 1 *Siderf.* 338. (*Kighly* v. *Bulkly*), is cited.

from the rest of the week.] As no rent could accrue on the 27th of *July*, the plaintiff is placed in an uncertainty whether the plea is intended to cover the odd days or not. [*Tindal* C. J. When you avow for less rent than is received, you are bound to shew what is become of the rest. (*a*)] [*Channell* Serjt. was then stopped by the court.]

Manning Serjt. (for *Bompas* Serjt., absent at nisi prius) in support of the second plea. The words "and on" may be rejected as surplusage. No rent would *become* due on the 27th of *July*, except by a new agreement between the parties. None being alleged, these words are insensible. Rejecting them, the plea is intelligible, and applies to all rent accruing due before the 27th of *July*, namely, up to the 22d of that month, which would be the termination of a week. Supposing the reservation of rent to have been "on the usual feast days," there would be no uncertainty in a plea alleging payments in respect of rent which accrued due *before* the 1st of *October* in any year. In *Com. Dig. Pleader* (C. 21.) it is laid down, that "in debt for freight on a charter-party, if the breach assigned is that the defendant has not paid for freight 200*l.* with average according to charter-party, it is good, though it does not say to what the average amounts," citing *Dodd* v. *Atkinson*. (*b*) [*Maule* J. There the objection was to the declaration and on general demurrer. More certainty is required in a plea.]

TINDAL C. J. It seems to me that we cannot reject the words "and on" as surplusage; and particularly

(*a*) At common law, an avowry for *part* of half a year's rent, without shewing the residue satisfied, is bad; *Hunt* v. *Braines*, 4 *Mod.* 402.; and see *Battey* v. *Trevillian*, *Sir Fra. Moore*, 278. 281. 1 *Wms. Saund.* 286. And it is *usual* to make such a statement when a part is avowed for under the 11 *G.* 2. *c.* 19. *s.* 22.

(*b*) *Cas. temp. Hardw.* 342.

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after the plaintiff has pointed out by special demurrer the uncertainty which arises on the plea.

Channell, in support of the demurrer to the fourth plea. This plea is equally bad with the former for uncertainty; and it is likewise bad in substance. The defendant, although he admits that he entered into the contract declared upon, pleads neither performance nor a release. The only ground on which the plea can be supported is, that it alleges either a surrender of the term or an eviction; but it is uncertain on which the defendant means to rely. If intended as a plea of surrender, it wants the requisites. *Com. Dig. Surrender* (N.). [*Tindal* C. J. The facts set forth seem rather pleaded as a suspension of the rent.] It alleges, in effect, only a *trespass*. (*a*)

TINDAL C. J. This plea is also bad. In order to be an answer to the declaration, it should have shewn something amounting to an actual expulsion or eviction.

Unless the defendant elects, within two days, to amend on payment of costs (*b*), the plaintiff must have judgment.

The rest of the court concurred.

Rule accordingly. (*c*)

(*a*) 1 *Wms. Saund.* 204. *n.*

(*b*) To which were added the terms, "pleading issuably," consenting that the venue be changed to *London*, and taking short notice of trial, if necessary.

No amendment was made; and, at nisi prius, the plaintiff obtained a verdict on the issues joined upon the other pleas.

(*c*) *Quære*, as to the admissibility of an allegation of an agreement, not under seal, to affect the terms of a contract *in the realty*. *Vide Willott* v. *Earle*, 1 *Vern.* 490.; *Newport* v. *Godfrey*, 3 *Lev.* 267.; *Phillips* v. *Lee*, 1 *Freem.* 262.; *Gage* v. *Acton*, *ibid.* 512., 1 *Com. Rep.* 67., *Carth.* 511., 1 *Salk.* 325., 12 *Mod.* 288., 1 *Ld. Raym.* 515., *Lord Holt*, 309., *Lill. Ent.* 214.; *Thompson* v. *Thompson*, 9 *Price*, 471.; 2 *Wms. Exec.* 810. 3d ed.

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MACLEAN and Another *v.* ABRAHAMS.

June 3.

The time for appearing to a writ of summons having expired on the 29th of *April*, a writ of *distringas* was moved for on the 30th, upon an affidavit which stated a search on the 30th, and that no appearance had been entered. This affidavit proving defective, it was amended and resworn on the 3d of *May*, when the application was renewed and granted; no further search having been made in the meantime.

Upon an affidavit stating that an appearance had been entered on the 30th, the court set aside the *distringas* and the subsequent proceedings thereon.

IN this case the writ of summons had been left at the defendant's house on the 22d of *April*, and on the 30th the plaintiffs applied for a *distringas* upon the usual affidavit, which stated a search on that day, and that no appearance had then been entered. The application having been refused, in consequence of a defect in the affidavit, the latter was amended, and was resworn on the 3d of *May*; and the motion being renewed on that day, was granted. No search for an appearance had been made in the meantime.

Channell Serjt., on a former day in this term, obtained a rule nisi to set aside the *distringas* (which had been executed,) and all proceedings thereon, with costs, upon the ground that the defendant had, previously to such *distringas* being granted, namely, on the 30th of *April*, entered an appearance.

Talfourd Serjt. now shewed cause. Even taking this as an affidavit originally sworn on the 3d of *May*, the *distringas* was properly granted. A reasonable time must necessarily be allowed between the search for an appearance and the application. In *Waugh* v. *Pry* (*a*) four days elapsed before the affidavit was sworn; but the court thought that there was no objection to the affidavit, inasmuch as the time for entering an appearance had expired. Where a defendant

(*a*) 7 *Dowl. P. C.* 376.

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appears after the proper time, he ought to give the plaintiff notice.

Channell Serjt., *contrà*. Where a party swears that no appearance has been entered for the defendant, the court infers, as a matter of course, that no appearance has been entered up to the time of applying for the *distringas*, or within a reasonable time previously. In the present case a fresh search should have been instituted before the affidavit was resworn.

TINDAL C. J. I think that previously to the reswearing of the affidavit, a fresh search should have been made. The statement which it contained, — that no appearance had been entered, — was *then* untrue. This is like the case of signing judgment for want of a plea, where the plea has been delivered in fact, though a little after the regular time.

The rest of the court concurring,

Rule absolute, but without costs, the goods taken to be returned, the defendant undertaking not to bring any action.

1841.

HOLLIDAY *v.* BOHN.

June 5.

In debt, the defendant having obtained a rule to plead two pleas to *part* of the demand, and nunquam indebitatus to the residue, by mistake pleaded non assumpsit to such residue, with the other pleas. The plaintiff signed judgment, generally. Held, irregular.

DEBT, upon a promissory note, and upon an account stated. The defendant having obtained a rule to plead, to the first count, non fecit, and payment, and to the second count, nunquam indebitatus, by mistake delivered, with the pleas to the first count, a plea of non assumpsit, instead of nunquam indebitatus, to the second count. The plaintiff signed judgment.

Channell Serjt. obtained a rule nisi to set the judgment aside for irregularity.

Bompas Serjt. now shewed cause. The pleas delivered not being pursuant to the rule, the defendant was guilty of an irregularity, of which the plaintiff had a right to avail himself by signing judgment.

The court, without calling upon *Channell* Serjt., made the rule absolute,—saying that the present case differed from that of a defendant, who delivers several pleas without having obtained a rule to plead several matters; in which case the plaintiff may properly sign judgment.

Rule absolute. (*a*)

(*a*) As the last count was answered only by the plea of non assumpsit; and as in debt, that plea is a nullity (*Brennan v. Egan*, 4 *Taunt.* 164.; *Ford v. Bernard*, 4 *M. & P.* 303.), it would seem that the plaintiff should have taken judgment, by *nil dicit*, as to so much of the declaration as was not covered by the other pleas. And, *quære*, whether if, accepting the issues tendered, he had replied without doing so, the whole action would not have been discontinued. See 1 *Wms. Saund.* 28. *n. Quære*, also, whether the judgment was irregular *in toto*, or only in respect of the first count, to which the valid pleas applied. *Vide antè*, Vol. I. 201. n.

1841.

June 10.

BLEADEN *v.* RAPALLO.

A count upon a breach of contract by a malfeasance in employing a vessel for an illegal purpose, whereby the vessel was seized, &c., may, under the rules of *H. T.* 4. *W.* 4., be pleaded with a count charging a breach of a contract between the parties, in detaining the vessel beyond the time for which she was hired.

ASSUMPSIT, by the plaintiff, as secretary to the Commercial Steam Packet Company. The first count stated, that, on the 6th of *July* 1840, in consideration that the company, at the request of the defendant, had let to hire to the defendant, and furnished for his use, a steam-vessel of the said company, of great value, to wit, &c., to go any where he or his friends pleased, at and for a certain reward, to be therefore paid by the defendant to the company for the same, the defendant promised the said company, whilst the said steam-vessel was so let to hire to him as aforesaid, to take due and proper care of the same, and not to use the same in any illegal or unlawful manner, or for any illegal or unlawful purpose; and the defendant then had the use of the said steam-vessel for the purpose aforesaid; yet the defendant, not regarding his said promise, afterwards, and whilst the said steam-vessel was so let to hire to the defendant, and whilst he had the use of the same, to wit, on the 6th of *August* in the year aforesaid, did not take due and proper care of the said vessel, and used the same in an illegal and unlawful manner, and for an illegal and unlawful purpose, in this, to wit, that the defendant then used the said steam-vessel in and about and for the purpose of raising and levying war and insurrection and rebellion against the king and the people of the kingdom of *France*, then and still being at peace and in amity with our Lady the now Queen; and in pursuance of and for that purpose, caused and procured the said steam-vessel to be navigated and directed, and the same then was, by the master and crew of the said vessel, navigated and

directed into the dominions of the king of the French aforesaid; and then and there, without the knowledge or consent of the said company, landed and disembarked out of the said steam-vessel, divers soldiers, &c., for the purpose of levying war, &c. against the said king; whereby the said steam-vessel, together with the tackle and apparel thereof, became and was liable to be seized and detained, and the master and crew thereof became and were liable to be imprisoned by the said king, &c. The count then alleged the seizure of the vessel, and her detention until the 13th of *November* 1840, and the imprisonment of the master and crew, whereby the company, for and during all that time, lost and were deprived of the use and services of the said steam-vessel, and of the said master and crew, and of all profits, &c. that would otherwise have arisen and accrued to them; and the company had, by means of the premises, been put to great expense in and about providing for, and maintaining, the master and crew, and in procuring their discharge, and in and about obtaining the restoration of their said steam-vessel, and the prevention of its confiscation.

The second count stated, that, on the said 6th day of *July* 1840, by a certain agreement, then made by and between the said company and the defendant, it was agreed that the company should provide a steam-vessel for the defendant's use, and let it to him for one month, to go any where he and his friends pleased; that he should give the company two days' notice when he should require the vessel; that, in consideration thereof, the defendant agreed with the company to pay them 100*l.* per week from the day and year last aforesaid, to the 6th of *August* then next, or, in the event of his not using the vessel, he agreed with the company to pay 130*l.* for the option of the use of it; and the defendant then agreed with and promised the said company

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not to detain the said vessel, or cause or procure the same to be detained from them beyond the space of one month. Averment: that the company confiding in the said promise of the defendant, did, afterwards, to wit, on the day and year first aforesaid, provide a steam-vessel of the said company for the defendant's service, and the defendant having given the company notice that he required the same, they did then let it to him, and he had the same for one month to go any where he and his friends pleased, &c. Breach: that the defendant not regarding his said agreement and promise, did cause and procure the said vessel to be detained from the said company beyond the said month for which the vessel was so let to the defendant as aforesaid, to wit, for the space of one hundred days beyond that month, in parts beyond the seas, to wit, in the kingdom of *France* and elsewhere; whereby the company, for and during all that time, lost and were deprived of the use of the said steam-vessel, and lost and were deprived of the profits, gains, and advantages which, during that time, they might and otherwise would have derived and acquired from the use of the same; and thereby, also, the company were, during all that time, put to and incurred, and became and were liable to pay, great charges and expenses, &c., in and about the providing for and keeping and maintaining the master and crew of the said vessel, &c.

The declaration also contained counts for the hire of the vessel, for money paid, money had and received, and money found due on an account stated.

Gaselee Serjt. moved for a rule to shew cause why the first count should not be struck out, upon an affidavit that there was only one contract between the parties. He contended that the insertion of both of the special counts was a violation of the rule of court of *H. T.*

4 *W.* 4., which provides that "several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each."

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TINDAL C. J. The first count is for a malfeasance; the second is founded upon the express contract between the parties. If we were not to allow the plaintiff to set up the collateral contract implied by law contained in the first count, we might probably deprive him of his principal ground of complaint.

The rest of the court concurred.

Rule refused.

BETHELL *v.* BLENCOWE.

June 11.

DEBT for 35*l.* for the use and occupation of divers rooms and apartments in, and parcel of, a certain messuage, together with certain household furniture therein, and on an account stated. Pleas: except as to the 2*l.* 10*s.* never indebted; and as to that sum payment into court; and issue thereon respectively.

At the trial, before *Maule* J., at the sittings at *Westminster*, after *Hilary* term, 1840, it appeared that the defendant, towards the close of the year 1838, became tenant to the plaintiff of certain furnished apartments, at the yearly rent of 120*l.* Pending a negotiation between the parties, the defendant had taken possession of the apartments; and after such entry, but before the terms of the tenancy were finally settled, the defendant wrote

During a negotiation for the tenancy of furnished apartments for a less term than three years, and after the defendant had taken possession, the defendant wrote, and the plaintiff signed, the following memorandum: "I shall be happy to allow Mr. *B.* to leave the apartments without any notice if he finds any thing which may at all lead him to suspect that there is any embarrassment in his landlord." Held, that this document was admissible in evidence without a stamp.

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the following memorandum, which the plaintiff signed and gave to the defendant: —

"I shall be happy to allow Mr. *Blencowe* to leave the apartments without any notice, if he finds any thing which may at all lead him to suspect that there is any embarrassment in his landlord."

The defendant occupied the apartments, and paid rent up to *Midsummer* 1839, when, finding that the plaintiff was in such embarrassed circumstances, that it was unsafe for a tenant to remain in the house, which was clearly established by the evidence, he quitted without having given any notice. The action was brought to recover 32*l.* 10*s.*, being a quarter's rent, from *Midsummer* up to *Martinmas* 1839, including 2*l.* 10*s.* for the use of a back kitchen, and also 2*l.* 10*s.*, being arrears claimed to be due for such back kitchen for the preceding quarter.

On the part of the defendant the above memorandum was offered in evidence. It was objected to by the plaintiff's counsel, and was rejected by the learned judge, on the ground that it was inadmissible without an agreement stamp. The defendant then called a witness to prove declarations by the plaintiff that he had given the defendant a paper, by which he would be enabled to leave his lodgings at any time if any suspicion should be excited; but this evidence was likewise objected to, and held not to be admissible.

A verdict was then taken for the plaintiff for 32*l.* 10*s.*, leave being reserved to move to enter a verdict for the defendant, in case the court should be of opinion that either the memorandum itself, or the declarations of the plaintiff respecting it, was or were admissible in evidence.

Ludlow Serjt. having, in *Easter* term, 1840, obtained a rule nisi accordingly,

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Talfourd Serjt. (*E. James* was with him) shewed cause at the sittings in banc after last *Hilary* term. The memorandum was properly rejected. The case for the defendant at the trial was, that the terms contained in the memorandum were engrafted on the original agreement. If the document had any operation, it amounted to a new contract, and not to a mere proposal; for it was written by the one party and signed by the other. *Drant* v. *Brown* (*a*), which was cited when the rule was moved for, is distinguishable. There, a proposal was put into writing by one party, and was afterwards assented to, orally, by the other; and the agreement so made was treated as being, in law, a parol agreement; and it was on that ground that the paper was held admissible without a stamp. In *Ramsbottom* v. *Morley* (*b*) a written paper, signed by the auctioneer and delivered to the bidder, to whom certain lands were let by auction, containing a description of the lands, the term for which they were let to the bidder, and the rent payable, was held to require a stamp. In *The King* v. *The Inhabitants of St. Martin's, Leicester* (*c*) it is said by *Patteson* J. "The statute imposes a stamp upon agreements under hand only, meaning such as have, *per se*, the binding effect of an agreement." This memorandum comes within that definition, forming a contract between the parties binding *per se*. With respect to the plaintiff's declarations, it cannot be contended after the decision in *Slatterie* v. *Pooley* (*d*), that a distinct admission by a party to a suit, with regard to the contents of a written instrument, is not receivable in evidence. But the present is distinguishable from that case. This is not an admission of a simple fact; for the declarations referred to the terms of the document; and no clear and

(*a*) 3 *B. & C.* 665., 5 *D. & R.* 582.
(*b*) 2 *M. & S.* 445.
(*c*) 2 *A. & E.* 210., 4 *N. & M.* 202.
(*d*) 6 *M. & W.* 664.

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definite meaning can be given to such declarations without looking at the memorandum. But, even if admissible, it is submitted that the declarations, unexplained by the document, are entitled to no weight.

Ludlow Serjt. and *Fitzherbert*, in support of the rule. It is clear that the memorandum amounted to a mere proposal, being given while the negotiation was proceeding and before any agreement had been finally concluded between the parties: neither does it contain the whole terms of the agreement. The mere fact of such a writing having passed is no evidence of any contract between the parties. Neither is it at all material that the document was written by one party and signed by the other; for if it does not otherwise amount to an agreement, that circumstance will not make it one. In *Drant* v. *Brown*, *Holroyd* J. says, "A stamp is not necessary to every writing given in evidence to support an agreement, but only to agreements themselves, or minutes or memorandums of agreements." In *Hawkins* v. *Warre* (*a*) the defendant's steward proved that a lease had been executed by the defendant but not by the plaintiff, the terms of which had been reduced into writing by the assent of both parties; and he stated that to be the final agreement between the parties. The plaintiff, in order to negative this statement, tendered in evidence another unstamped paper in the handwriting of the defendant's steward, the effect of which was to shew, that it was subsequently proposed by him that the plaintiff was to hold at a rent different from that mentioned in the lease. It was held that as this paper was not signed by the parties, it did not amount to an agreement or minute of an agreement, but to a proposal only, and therefore that it did not require a stamp, and

(*a*) 3 *B. & C.* 690., 5 *D. & R.* 512.

was properly received in evidence. With regard to the plaintiff's declarations, *Slatterie* v. *Pooley* is a direct authority that they were admissible. *Doe dem. Lowden* v. *Watson* (*a*) and *Earle* v. *Picken* (*b*) are in accordance with that decision; the only authority to the contrary being *Bloxam* v. *Elsie* (*c*); which may be considered as overruled.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

In this case the defendant had leave given to him by my brother *Maule*, who tried the cause, to enter a verdict for himself, in case the court should be of opinion that a certain written paper signed by the plaintiff was receivable in evidence without a stamp. According to the report of the learned judge, a negotiation had been entered into between the plaintiff and the defendant, for the letting of certain apartments of the plaintiff to the defendant, pending which negotiation, and before it was completed, the defendant entered and took possession. In this state of proceedings, and before the terms had been fully settled, a conversation took place between the parties, and at the close of it, the defendant wrote down on a piece of paper the words following, which the plaintiff signed, and then delivered to the defendant, viz.: — "I shall be happy to allow Mr. *Blencowe* to leave the apartments without any notice, if he finds any thing which may at all lead him to suspect that there is any embarrassment in his landlord." The question therefore is, whether this purports to be an agreement, or any minute of an agreement, between the parties, in which case it would require a stamp; or whether it is any thing more than a

(*a*) 2 *Stark. N. P.* 230.
(*b*) 5 *C. & P.* 542.
(*c*) *R. & M.* 187., 1 *C. & P.* 558.

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proposal made by one of the parties to the other pending a negotiation for a tenancy, as to one particular point then under discussion.

And we think it falls within the latter description. The parties were negotiating for a tenancy for a less term than three years; so that it was unnecessary that there should be an agreement in writing signed by the parties. (*a*) The terms of the tenancy might therefore be proved by parol evidence; and, in the course of such proof, a written offer or proposal, as to a particular term of the taking, might well be given in evidence, not as the agreement itself, but as one step or link in the evidence of the contract of taking. *Vaughton* v. *Brine*. (*b*)

In this point of view, we think that this document was admissible without a stamp, and that the defendant was at liberty to quit, without notice, under the circumstances proved, and, accordingly, that the verdict should be entered for the defendant.

Rule absolute. (*c*)

(*a*) The second section of the statute of frauds excepts from the operation of the first section, "all leases not exceeding three years from the making thereof, whereupon the rent reserved to the landlord during such term, shall amount unto *two third parts*, at the least, of the full improved value of the thing demised." In a case where the demise was of furnished apartments, no question would be likely to arise on the second point of the exception.

(*b*) *Antè*, vol. i. 359., 1 *Scott, N. R.* 258.

(*c*) For the opinion of the court with respect to the admissibility of the plaintiff's declarations, see *Howard* v. *Smith post*.

BARTHOLOMEW *v.* CARTER.

June 11.

TRESPASS, for assault and false imprisonment. Plea: not guilty.

At the trial, before *Coltman* J., at the sittings at *Westminster*, in *Hilary* term 1840, it appeared that the plaintiff had been a constable in the metropolitan police force, in which the defendant was a superintendent. By the regulations of the commissioners, every constable, who is unmarried, is bound, if required, to reside in one of the station houses; and every constable, who is discharged, or who quits the force, forfeits his pay for the current week, and is bound to deliver up his uniform. The plaintiff, who was unmarried, having been required by the defendant, on the 25th of *July* 1839, to reside in a station house belonging to the division to which he was attached, refused to do so, and resigned his situation. The defendant sent another constable to demand his uniform, which however he refused to give up without receiving his arrears of pay. Having afterwards, in the course of the same evening, gone to the station house, the sergeant on duty detained him in custody until the following day, when he was taken before a magistrate, by whom he was discharged. (*a*)

The rule of *Trinity* term, 1 *Vict.*, whereby it is ordered "that in every case in which a defendant shall plead the general issue intending to give the special matter in evidence by virtue of an act of parliament, he shall insert, in the margin of the plea, the words 'by statute,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament," is a rule which the courts, by virtue of their inherent jurisdiction, and independently of the 3 & 4 *W.* 4. *c.* 42. *s.* 1., had power to make.

A defendant pleading — not guilty — only, and omitting to comply with the rule, is not entitled to avail himself of the defence, that a notice of action, required by a statute under which he was acting, has not been given.

(*a*) Now, by the 2 & 3 *Vict.* *c.* 47. *s.* 16., "every constable belonging to the metropolitan police force, who shall be dismissed from, or shall cease to hold and exercise, his office, and who shall not forthwith deliver over all the clothing, accoutre-

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To connect the defendant with the imprisonment, it was shewn that, having gone to the station house in the course of his duty, and having found the plaintiff in custody, he told the sergeant to allow the plaintiff to have what he wanted, but not to let him out, and that the defendant had entered the supposed offence in the charge sheet.

It was contended on the part of the defendant that the plaintiff must be nonsuited, the defendant having received no notice of action, pursuant to the 10 *G.* 4. *c.* 44. *s.* 41. (*a*)

For the plaintiff it was insisted that the act complained of was not an act done by the defendant in pursuance of the statute; and that, consequently, he was not entitled to notice; *Cook* v. *Leonard* (*b*); and that, at all events, the defendant could not claim the protection of the statute, as he had not complied with the rule of *Trinity* term, 1 *Vict.*; whereby it is ordered, that "in every case in which a defendant shall plead the general

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ments, appointments, and other necessaries which may have been supplied to him for the execution of his duty to the superintendent, or to such person, and at such time and place as shall be directed by the said superintendent, shall be liable to imprisonment with or without hard labour for any time not exceeding one calendar month; and it shall be lawful for any justice of the peace to issue his warrant to search for and seize to the use of Her Majesty, all the clothing, accoutrements, appointments, and other necessaries which shall not be so delivered over wherever the same may be found."

(*a*) Which enacts, "that all actions and prosecutions, to be commenced against any person, for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; *and notice in writing of such action, and of the cause thereof, shall be given to the defendant, one calendar month, at least, before the commencement of the action;* and in any such action, *the defendant may plead the general issue, and give this act, and the special matter, in evidence, at any trial to be had thereupon,*" &c. &c.

(*b*) 6 *B.* & *C.* 351., 9 *D.* & *R.* 339.

issue, intending to give the special matter in evidence by virtue of an act of parliament, he shall insert in the margin of the plea the words 'by statute,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue, and of the nisi prius record."

On the part of the defendant *Butler* v. *Ford* (*a*) was cited upon the first point; and with respect to the second, it was submitted that the judges had no power by a rule of court, to alter the provisions of an act of parliament. The learned judge allowed the case to go to the jury, who found a verdict for the plaintiff, damages 5*l*.; leave being reserved to the defendant to move to enter a nonsuit.

Humfrey having in *Hilary* term, 1840, obtained a rule accordingly,

Bompas Serjt. and *Martin* shewed cause. It is clear that the defendant was not acting, and that he had no pretence for thinking he was acting, in pursuance of the 10 *G.* 4. *c.* 44., when he committed the trespass of which the plaintiff complains. But at all events the defendant cannot avail himself of the statute under the plea which he has placed upon the record. If he meant to claim its protection, he should have complied with the rule of *Trinity* term, 1 *Vict.* And, as he has not done so, he cannot take advantage of the want of notice, not having pleaded it specially. The defence to an action by an attorney for his bill, that no signed bill was delivered under the 2 *G.* 2. *c.* 23. *s.* 23. must be pleaded, (*b*); and the reason why it is different under the apothecaries' act, 55 *G.* 3. *c.* 194. *s.* 21., is

(*a*) 3 *Tyrwh.* 677., 1 *C.* & *M.* 662.

(*b*) *Antè*, vol. ii. 816. (*b*).

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the peculiar language of that statute; *Morgan* v. *Ruddock* (*a*), *Shearwood* v. *Hay*. (*b*)

With respect to the rule of *Trinity* term, 1 *Vict.*, — requiring the words "by statute" to be placed in the margin of every plea of the general issue pleaded by virtue of any act of parliament,—the effect of that rule is not to take away or to narrow the right which a defendant may have under any statute. The rule merely relates to a matter of practice, which, there can be no doubt, the judges have power to regulate, either by virtue of their inherent jurisdiction over the proceedings of the court, or under the authority of the 3 & 4 *W.* 4. *c.* 42. *s.* 1.

Humfrey in support of the rule. It is submitted that the defendant, in what he did, was acting under the 10 *G.* 4. *c.* 44. *s.* 41. But supposing that, in strictness, he was not, if he *bonâ fide* believed he was so acting, he is entitled to the benefit of the statute. (*c*) The next point is, whether the want of notice should have been pleaded. [*Maule* J. It is not denied by the other side that if the plea of — not guilty, without saying "by statute," lets you into your whole defence, you may shew the want of notice.] Under the 3 & 4 *W.* 4. *c.* 42. *s.* 1. (*d*),

(*a*) 4 *Dowl. P. C.* 311.

(*b*) 5 *A. & E.* 383., 6 *N. & M.* 831.

(*c*) See *Beschey* v. *Sides*, 9 *B. & C.* 806., 4 *M. & R.* 634.; *Ballinger* v. *Ferris*, *Tyrwh. & G.* 920. & 1 *M. & W.* 628.

(*d*) Which enacts, "that the judges of the superior courts of common law, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, shall and may, by any rule or order to be from time to time by them made in term or vacation, at any time within five years from the time when this act shall take effect, make such alterations *in the mode of pleading* in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs and otherwise, for carrying into effect the said alterations, as to them may seem expedient; and all such rules, orders, or regulations shall be laid before both houses of parliament, if parliament be then sitting, immediately upon the making of the same, or, if

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the judges had no power to make a rule requiring the words "by statute" to be inserted in the margin of a plea of not guilty pleaded by virtue of an act of parliament. It is said that the rule only requires the words "by statute" to be put in the margin of the plea; but if the judges can order those words to be placed there, they may order them to be introduced into the body of the plea, or, instead, may require some form of words shewing the nature of the intended justification. The proviso in the 3 & 4 *W.* 4. *c.* 42. *s.* 1. will be rendered nugatory, if the judges may deprive a defendant of the protection intended to be conferred upon him by any statute, unless he complies with the regulation made by the rule of court. It is clear that the rule has the effect of depriving this defendant, who has pleaded the general issue, of the power of giving the special matter in evidence. But the question as to the want of notice does not depend upon whether the court had power to make this rule. By the 10 *G.* 4. *c.* 44. *s.* 41., the plaintiff was bound to give the defendant a month's notice of his intention to bring his action. The defendant may have pleaded the general issue, — which he had power to do at common law, — without intending to give any special

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parliament be not sitting, then within five days after the next meeting thereof, and no such rule, order, or regulation shall have effect until six weeks after the same shall have been so laid before both houses of parliament, and any rule or order so made shall, from and after such time aforesaid, be binding and obligatory on the said courts, and all other courts of common law, and on all courts of error into which the judgments of the said courts or any of them shall be carried by any writ of error, and be of the like force and effect as if the provisions contained therein had been expressly enacted by parliament: *Provided always, that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now, or hereafter shall be, entitled to do so by virtue of any act of parliament, now, or hereafter to be, in force.*"

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matter in evidence, but relying on this omission as disentitling the plaintiff to maintain the action. Suppose the venue in this action had been laid in a different county from that in which the fact was committed, or the action had been brought more than six months afterwards, would the defendant be precluded under his present plea from raising either of those objections? [*Tindal* C. J. The words of the 10 *G.* 4. *c.* 44. *s.* 41. closely resemble those of the 21 *Jac.* 1. *c.* 16., under which the defence must be specially pleaded.] That statute does not destroy the debt, but merely bars the remedy, in case the debtor chooses to avail himself of its provisions. But the 10 *G.* 4. *c.* 44. *s.* 41. declares that actions shall be brought "within six calendar months after the fact committed, *and not otherwise*:" thereby making it illegal to bring them after the period prescribed.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

The point raised upon the motion to enter a nonsuit in this case is, in effect, whether the rule of all the courts, made in *Trinity* term, 1 *Vict.*, viz. "that in every case in which a defendant shall plead the general issue, intending to give special matter in evidence by virtue of an act of parliament, he shall insert in the margin of the plea the words '*by statute*,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament, and that such memorandum shall be inserted in the margin of the issue and of the nisi prius record," be or be not a rule which the judges had authority to make. On the part of the defendant it is contended that the judges had no such authority under the 3 & 4 *W.* 4. *c.* 42. That statute (*s.* 1.) authorises them to make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcrib-

ing pleadings, &c., as to them may seem expedient, with a proviso. [His Lordship here read the restrictive proviso.(a)] Looking at the words of the act of parliament, even assuming that the authority under which the rule in question was made was derived from that statute, it would, as it appears to us, be difficult to maintain that the rule has in any degree deprived the defendant in this case of the power of pleading the general issue, and giving the special matter in evidence; for the plea itself in point of form, and the effect and consequences of the plea, remain altogether unaltered and unaffected by the rule. But the rule in question is founded upon the jurisdiction, necessarily inherent in all courts, to make rules for the regulation of their practice. (b) The rules by which the time for pleading — the delivery or service of pleas — and other matters of a similar nature, are governed, proceed from such authority, and no other. When the 2 *G.* 2. *c.* 22. gave the power of pleading a set-off, no one surmised that the practice, shortly afterwards adopted by the courts, that unless a particular of the set-off was delivered, no evidence of set-off should be given under the plea, was an excess of jurisdiction on their part, or a repeal of the enactment. It was a matter of practice only, subsidiary to the full and complete execution of the intention of the act. (c) If, instead of ordering that the words "by statute" should be inserted in the margin, the rule had directed, that pleas of the general issue under statutes, should, for distinction's sake, be filed at a particular office, or delivered to a particular officer, or within a particular time, could any one doubt the court's autho-

(a) *Antè*, 129. n.

(b) *Serviens ad legem*, 249.

(c) The statute requires that notice be given "of the particular sum or debt so intended to be insisted upon, and *upon what account* it became due," where the general issue is pleaded; and it allows the *matter* to be *pleaded in bar*, without giving any directions as to the form of the plea.

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rity to do so? The present rule falls clearly within the principle of these and similar rules, made for the government and regulation of the proceedings of the court.

We, therefore, think the rule for entering a nonsuit must be discharged.

Rule discharged.

June 12.

In re ANNE, the wife of JEREMIAH HORSFALL.

An order to enable a married woman to make a conveyance of her property without her husband's concurrence, under the 3 & 4 *W.* 4. *c.* 74. *s.* 91., cannot be made without an affidavit from her, negativing any communication from him.

But where a delay until the following term would have caused great inconvenience to the parties, the court gave directions for the order to be drawn up in vacation on the production of an affidavit from the wife.

LUDLOW Serjt. moved for an order of the court, under the 3 & 4 *W.* 4. *c.* 74. *s.* 91., to enable a married woman to convey her interest in certain property, without her husband's concurrence. The wife made no affidavit; but affidavits were produced from an attorney, shewing the state of the title, and from the petitioning creditor, stating the bankruptcy of *J. H.*, and his disappearance from home in *December* 1840.

TINDAL C. J. We have already decided that such an order cannot be made without an affidavit from the wife, to negative any communications from her husband; *In re Mary Williams.* (*a*)

It being suggested that great inconvenience would result if the motion was postponed till *Michaelmas* term, the court directed the order to be made on the production of a proper affidavit from the wife.

Order accordingly. (*b*)

(*a*) *Antè*, Vol. I. p. 881.

(*b*) An affidavit by the wife, stating ineffectual attempts to obtain tidings of her husband and her ignorance whether he was alive or dead, being made on the 2d of *July*, the order was drawn up.

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June 9.

ASSUMPSIT. The first count of the declaration stated, that on &c., in consideration that the plaintiff had, at the request of the defendant, entered a certain horse of the plaintiff, to run in a certain race to be thereafter run by horses for a certain stake, to wit, a sweepstakes of 3*l.* for and in respect of each horse entered or to be entered for such race, together with a further large sum, to wit, 15*l.* to be added thereto; and had, at the like request of the defendant, then, to wit, on the entering of the said horse, paid to the defendant a large sum of money, to wit, 3*l.* as and for the contribution of him, the plaintiff, towards the said sweepstakes; the defendant then promised the plaintiff, that if in running the said intended race, the horse of the plaintiff should beat the other horses which should be duly entered for, and should run in, the said race, he, the defendant, would pay to the plaintiff the said stake; that the said stake, that is to say, the said sweepstakes, together with the said further sum to be thereto added, amounted to a large sum of money, to wit, 30*l.*; and that afterwards, to wit, on the day and year aforesaid, the said intended race was run, and the said horse of the plaintiff did, in running the said race, beat the said other horses, whereof the defendant then had notice; yet the defendant did not pay, nor had he

One of the conditions of a race was, that the riders should be "gentlemen, farmers, or tradesmen, never having ridden as regular jockeys or paid riders;" another, that the decision of the committee, on any dispute, should be final. The rider of the plaintiff's horse had been in the habit of riding at races, but never had been paid for his services, although he had sometimes received his expenses. The plaintiff's right to the stakes (his horse having come in first), had been disputed, on the ground of an alleged cross, and the subject had been brought before the committee, who however came to no final decision.

Held, that the rider of the plaintiff's horse was not disqualified.

Also, that in special assumpsit for the amount of the stakes run for, the objection, that there had been no final decision by the committee, could not be raised without being specially pleaded.

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since paid to the plaintiff (although a reasonable time since the running of the said race had long since, and before the commencement of the suit, elapsed), the said stake, or any part thereof, but to pay the same or any part thereof, had altogether refused, and still did refuse. There were also counts for money had and received, and upon an account stated.

Pleas: first, non assumpsit, to the whole declaration. Secondly, to the first count, that the said horse of the plaintiff did not, in running the said race in the said first count mentioned, beat the said other horses, in manner and form as therein mentioned; concluding to the country. Thirdly, to the same count, that the said race in the said first count mentioned was run for under a certain article and upon certain conditions, which said article was as follows, that is to say, "Hunters' stake. A sweepstakes of three sovereigns each, with fifteen sovereigns added from the fund, for horses not thorough bred, which have been duly hunted with the *North Shropshire* and Sir *T. Boughey's* fox hounds in the season 1839–40. Weights, four years, 11 st. 8 lbs.; five years, 12 st. 4 lbs.; six and aged, 12 st. 10 lbs. A winner of any race to carry,—for winning once 3 lbs., twice 5 lbs., thrice 7 lbs.—extra. A winner of *50l.* at any one time, to carry 10 lbs. in addition to the above extra weights. Mares and geldings allowed 3 lbs. Certificates of qualification to be produced to the treasurer or committee, previously to the time of entry. Twice round and a distance heats. Riders, the same as for a certain other stake called the *Hack Stakes*, that is to say, to be ridden by gentlemen, farmers, or tradesmen, being *persons never having ridden as regular jockeys or paid riders.*" And which said conditions were as follows, that is to say, "Three reputed horses to start for each race, or the money added will not be given without the consent of the committee. The horses to be ready to start precisely at two o'clock; if not prepared

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to start at the time, each horse to forfeit his entrance money, and be excluded from starting for the race. The day of entrance to be closed on *Wednesday*, the 12th of *August* 1840, at six o'clock in the evening. The colours of the riders to be named at the time of entry, and not to be altered, under the penalty of one sovereign. The winner of the hunters' stakes, to pay one sovereign to the fund, and of each other race, 10*s*. *The decision of the committee*, or whomsoever they may appoint, *on any dispute that may arise, to be final.*" The plea then alleged, that the rider of the said horse of the plaintiff in and for the said race was not a gentleman, farmer, or tradesman, being a person who had never ridden as regular jockey or paid rider, but, on the contrary thereof, had before ridden as a regular jockey *for pay*. Verification. Fourthly, to the same count, that the said race in the said first count mentioned, was run for under the same article and upon the same conditions as in the plea last preceding were particularly mentioned and set forth; that a certain mare of one *Smallwood* was duly entered for, and ran second in, the said race to the said horse of the plaintiff; that after the running of the said race, a dispute arose between the plaintiff and the said *T. Smallwood*, whether the said horse of the plaintiff or the said mare of the said *T. Smallwood* had won the said race, and whether the plaintiff or the said *Smallwood* was entitled to the said stakes, and the said sum to be added as in the said first count mentioned; and which said dispute was then, in pursuance of the said conditions, referred to the said committee; that afterwards, and *after* the commencement of the suit, the said committee duly made their decision, and thereby decided that the said mare of the said *Smallwood* had won the said race, and that he, and not the plaintiff, was entitled to the said stakes and sum of money. Verification.

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Issue was joined on the first and second pleas, and to the third the plaintiff replied, that the rider of the said horse of the plaintiff in and for the said race *was* a gentleman, farmer, or tradesman, being a person who had never ridden as a regular jockey or paid rider,—concluding to the country; and to the fourth plea he replied *de injuriâ*. Issue on the last two replications.

At the trial before *Coleridge* J., at the last spring assizes for *Shropshire*, it appeared that three horses started for the hunters' stake, namely, the plaintiff's horse *Deception*, a mare called *Springflower*, belonging to a Mr. *Smallwood*, and a horse called *Master Harry*. The plaintiff's horse was ridden by one *Boot*, who was in the habit of riding at races, but was not a regular jockey, never receiving any remuneration, although he occasionally was paid his expenses. *Deception* won the first heat, and also came in first in the second, but that heat was claimed for *Springflower*, who ran second, by reason of *Deception*'s rider having committed, what is called in racing law, a cross. *Springflower* was walked over the course for the third heat. After the race *Boot* was requested to attend before the committee, but neglecting to do so, they entered into an inquiry, and came to a resolution, that unless the plaintiff produced evidence before them on the following morning, which should induce them to change their opinion, their decision was that *Springflower* was the winner. Their determination was communicated to the plaintiff, who however offered no evidence, and nothing further was done in the matter.

For the defendant (who was proved to be the stakeholder), it was contended, that the plaintiff should be nonsuited, inasmuch as the decision of the committee was final and conclusive; and also that *Boot*, the rider of the plaintiff's horse, was disqualified.

The learned judge being of opinion that the committee had not come to an absolute decision, refused

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to nonsuit the plaintiff, and left three questions to the jury: first, whether the committee had decided the dispute before the commencement of the action, adding, that if so, their decision would be conclusive; secondly, whether *Boot* was a qualified rider within the terms of the issue — giving it as his opinion, that the disqualification had not been established; and, thirdly, whether *Boot* had unfairly crossed *Springflower* in the second heat. The jury having returned a verdict for the plaintiff, damages 29*l.*

Ludlow Serjt., in *Easter* term, obtained a rule nisi for a new trial on the ground of misdirection, and that the verdict was the evidence.

Talfourd Serjt. (with whom was *Whateley*) now shewed cause, and submitted that there was no pretence for disturbing the verdict, the case being one for the jury, who had been properly directed by the learned judge.

Ludlow Serjt., in support of the rule, contended that the rider of the plaintiff's horse was clearly disqualified; and that there had been a cross. With respect to the committee, although their decision was at first conditional, it became absolute upon the plaintiff's neglect to adduce evidence before them. If, on the other hand, no decision was come to, the plaintiff has no right to claim the stakes. For, as there was a dispute raised before the committee, until they decided in favour of the plaintiff, the latter could not recover the money in the hands of the stakeholder, as money had and received to his use. And this objection is open to the defendant under non assumpsit.

TINDAL C. J. I see no reason to be dissatisfied with the way in which this case was left to the jury, or with the conclusion come to by them upon the questions

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whether the plaintiff's horse fairly won the race, and whether *Boot* was a qualified rider according to the conditions of the race, which were clearly questions for them to decide. A "regular jockey or paid rider" evidently means one who follows the business of a jockey for a livelihood; and I think that *Boot* cannot be considered as disqualified under the conditions, not being a professed jockey, and never having been paid as such, although he had sometimes received his expenses. The only point that has presented any difficulty to my mind, is one which was not urged at the trial, namely, that as the committee had taken cognizance of the dispute, the plaintiff could have no right to recover until they had finally decided the matter. That might possibly have been the case had an action been brought for money had and received. But this is an action upon the special contract, — that in consideration that the plaintiff would enter his horse for the race, and pay a certain sum, the defendant promised the plaintiff that if his horse won the race he would pay him the stakes; and, upon non assumpsit, the only question is, whether the defendant entered into the contract set forth in the declaration. (*a*) If the defendant had intended to rely upon the objection that there was no final decision by the committee, he should have raised the point by a special plea.

The rest of the court concurring,

Rule discharged. (*b*)

(*a*) *R. H.* 4 *W.* 4. 3 *N.* & *M.* 7.; 10 *Bingh.* 469.

(*b*) And see *Pugh* v. *Jenkins*, 1 *A.* & *E. N. S.* or *Queen's Bench Reports*, 631.; 1 *Gale* & *Davison*, 40.

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with feet of divers horses and dogs, treading down &c. the grass, corn, &c. of the plaintiff, of great value, to wit &c., growing and being in the said close, and going and walking backwards and forwards in and upon and over the said close, and going and returning and passing and repassing in and out of the said close &c., and with the said horses and dogs, beating, hunting, and searching in the said close, for game, &c.

Second plea, that before the first of the several times when &c. in the declaration mentioned, to wit, on &c., by a certain act of parliament made in the 52d year of *G.* 3. (*a*), "for inclosing lands in the manor and parish of *Marrick*, in the county of *York*," after reciting that there were within the manor and parish of *Marrick*, in the north riding of the county of *York*, a certain moor or common and waste lands, containing, by estimation, four thousand acres or thereabouts, and that *W. P. Powlett*, Esq. was lord of the said manor of *Marrick*, and, as such lord, was seised of or entitled to the soil of the said moor or common and

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division; and that, from the time of such allotment until and at the time when, &c., the close in which, &c., had been possessed and occupied in severalty by *B.* and the plaintiff, and those claiming under *B.*, by virtue of the allotment;" and that *A.* being seised in fee of the manor of *Dale*, together with the rights, royalties, members, and appurtenances conveyed the same to *C.*, father of *D.*, one of the defendants, to whom the same descended as the son and heir of *C.*; and justified the entry of *D.* as lord of the manor, — and by the others, as his servants, — upon the close, in exercise of a right of hunting and fowling therein.

Held, first, that the plea shewed such an exclusive possession of the close, in the plaintiff, as to entitle him to maintain trespass; and that, consequently, it was immaterial whether or not the legal seisin was still vested in the lord.

Secondly, that the right of sporting over the allotments of the moor or common, was not reserved to the lord by the saving clause in the inclosure act; the object of that clause being, to reserve to the lord all those manerial rights which he possessed before the inclosure, as lord, except the right to the soil; and the power of the lord to sport over a waste within his manor, being, not a licence or liberty, but a mode of enjoyment of his own property.

(*a*) Cap. cxxvi.

waste lands, and to all the mines, minerals, quarries, and royalties in, over, and under the same, and that the said *W. P. Powlett*, *J. P.*, &c., and divers other persons, were respectively owners and proprietors of messuages, inclosed lands, and tenements within the said manor and parish, some of which were of freehold tenure, and others were held under leases for long terms of years granted by some or one of the ancestors of the said *W. P. Powlett*, and in respect thereof, or as appendant, appurtenant, or belonging, thereto, they, or their lessees, or tenants were entitled to rights of common in, over, or upon the said moor or common and waste lands, and that an act was passed in the 41 *G.* 3. (*c.* 109., the general inclosure act), and that the said moor or common and waste lands in their then state were of little value, and incapable of improvement; but if the same were divided, and specific shares thereof allotted to the several proprietors, according to their several rights and interests, and such allotments were inclosed and held in severalty, such division, allotment, and inclosure would be a great improvement to their estates, but that those beneficial purposes could not be effected without the aid and authority of parliament; it was, by the said first mentioned act of parliament, among other things, enacted that the said moor or common, called *Marrick* moor, and all the wastes and other commonable lands within the manor and parish of *Marrick* aforesaid, should be divided, set out, and allotted as soon as might be after the passing of the said act, by *Y.* and *Z.*, who were, by the said act, appointed commissioners for those purposes, and for carrying the said act into execution, in such manner, and subject to such directions and regulations, as were in the first mentioned act contained, and with such of the powers, and subject to such of the rules, orders, directions, and regulations contained in

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the said act of the 41 G. 3. (c. 109.), as were not controlled by, or repugnant to, or otherwise provided for, by any of the clauses or provisions contained in the first mentioned act.

After setting out a clause providing for the giving of certain notices by the commissioners, the plea proceeded:—and that the said commissioners should set out, allot, and award unto and for the said *W. P. Powlett*, his heirs, or assigns, (over and above, and exclusive of such shares and allotments of and in the said moor or common as should in pursuance of that act be allotted to him or them, in lieu of his and their rights of common), one full eighteenth part, in value, of the said moor or common and waste lands, thereby directed to be divided, in full compensation and satisfaction of and for his and their right to the soil of the said moor or common and waste lands, except as thereinafter was reserved to him, and that after setting out all the public and private roads and ways and other conveniences, as by the said act of the 41 G. 3. was directed, and the allotment or allotments thereinbefore directed to be made, the said commissioners should set out, divide, and allot all the residue of the said moor or common wastes or other commonable lands, thereby directed to be divided and allotted, unto and between and amongst the several proprietors of such antient messuages, cottages, inclosed grounds, and tenements, in *Marrick* aforesaid, who, in respect thereof, were entitled to rights of common in, over, or upon the said commonable lands or any part thereof, in proportion, and according, to the true and real value of such antient messuages, cottages, inclosed grounds, and tenements; and that the allotments to be set out in pursuance of that act, should be had and taken, by the several persons entitled thereto, in lieu and full bar and compensation and satisfaction of and for their

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other rents and acknowledgments, reserved and usually paid, and which were due and demandable, for all and every or any of the houses, buildings, cottages, intacks, or inclosures then built, made, being, or standing, in or upon the said moor or common or the boundaries thereof, or in or upon any ground formerly part of the said moor or common then held or enjoyed in severalty (except as to such encroachments as should be allotted by virtue of that act), and which theretofore had been, or which ought to be, paid, made, or performed by the owners or possessors, for the time being, of such houses, buildings, or cottages, or of any of the intacks or inclosures theretofore parcel of the said moor or common, and then held and enjoyed in severalty (except as aforesaid); all quit-rents, free-rents, and other rents, reliefs, dues, customs, amercements, and all goods and chattels of felons and fugitives, of felons of themselves, and of those put in exigent, deodands, treasure-trove, waifs, estrays, forfeitures, escheats, fairs, markets, tolls, stallages, rights, royalties, *with free warren, and liberty of hunting, hawking, fishing, and fowling*, immunities, jurisdictions, privileges, profits, commodities, advantages, emoluments, matters, and things, whatsoever, *to the said manor, or to the lord or lords thereof, for the time being, incident, belonging, or appertaining*, in as full, ample, and beneficial a manner, to all intents and purposes, *as he or they could or might have enjoyed the same, if that act had not been made;* as, by the record of the said act of parliament, remaining among the rolls of parliament of our Lady the now Queen, at *Westminster*, in the county of *Middlesex*, may more fully appear.

Averment: that after the making and passing of the first mentioned act for inclosing the said lands in the manor and parish of *Marrick*, in the county of *York*, and before &c., to wit, on the 1st of *August* 1814,

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the said *Bower* and *C.* having first and before they proceeded to put the said first mentioned act into execution, to wit, on, &c., duly, and according to the said act of parliament of the 41 *G.* 3., taken and subscribed the oath ordained and prescribed to be in that behalf taken by the last-mentioned act of parliament, and having first duly complied with all the provisions of the said acts by them first to be complied with, and duly qualified themselves to act as thereafter mentioned according to the provisions of the said acts respectively, did, in pursuance of the provisions of the first mentioned act, and according to the said first mentioned act, set out and allot unto, and for, the said *W. P. Powlett*, his heirs and assigns, over and above, and exclusive of, such shares and allotments of and in the said moor or common as were, in pursuance of the first mentioned act, allotted to him and them *in* lieu of his and their rights of common, one full eighteenth part, in value, of the said moor or common and waste lands, in full compensation and satisfaction, of and for his and their right to the soil of the said moor or common and waste lands, except as was by the first mentioned act thereinafter reserved to him the said *W. P. Powlett* as thereinbefore was mentioned. That afterwards and before &c., to wit, on the 1st of *August* 1814, and after setting out all the public and private roads and ways, and other conveniences, as, by the said act of the 41 *G.* 3., was directed, and the said allotment thereinbefore mentioned to have been made to the said *W. P. Powlett*, his heirs and assigns, the said commissioners, in pursuance of the thereinbefore first mentioned act, and according to the said first mentioned act, did set out, divide, and allot, all the residue of the said moor or common, wastes, and other commonable lands, by the said thereinbefore first-mentioned act, directed to be divided and allotted, unto, between, and amongst, the several proprietors of such antient messuages, cottages,

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enclosed grounds, and tenements in *Marrick* aforesaid, who, in respect thereof, were entitled to rights of common, in, over, or upon the said commonable lands, or any part thereof, in proportion, and according to the respective true and real values of such antient messuages, cottages, enclosed grounds, and tenements. That the close in which &c. was a part of the said residue of the said common wastes and other commonable lands so set out, divided and allotted between and amongst the several proprietors of such antient messuages &c. in *Marrick* aforesaid, as thereinbefore mentioned, which said residue before and at the time of the passing of the first-mentioned act, was parcel of the said manor and of the demesne lands thereof: that the said close in which, &c. was so then, before the plaintiff had any thing in the said close, in which &c., allotted to one *Ince*, who thereupon afterwards and before &c., to wit, on the day and year last aforesaid, took possession of, and occupied, the said close in which &c. *in severalty* under and by virtue of the said allotment and division; from which time, until and at the several times when &c. the said close in which &c. had been possessed and occupied in severalty by the said *Ince*, and by the plaintiff, and those claiming under the said *Ince*, under and by virtue of the said allotment: that the said *W. P. Powlett*, before and at the time of the making and passing of the thereinafter first mentioned act of parliament, was seised in his demesne as of fee, of and in the said manor of *Marrick*, together with the rights, royalties, members, and appurtenances thereunto appertaining. The plea then, after alleging a conveyance by lease and release, of the 18th and 19th of *August* 1817, from *W. P. Powlett*, of "all and singular the said manor or lordship of *Marrick*, together with the rights, royalties, members, and appurtenances thereto appertaining," to *Josias Morley*, proceeded to allege that, by virtue of that

conveyance, *Josias Morley* became and was seised in fee, of and in the said manor with the rights, royalties, members, and appurtenances, and continued so seised until and upon a certain day long before any of the said times when &c. to wit, on the 1st of *January* 1838, when the said *Josias Morley* died so seised as aforesaid; whereupon and whereby the said manor with the said rights, royalties, members, and appurtenances descended, and came to the defendant *Francis Morley*, as the eldest son and heir at law of the said *Josias Morley*; and thereby he, the defendant *Francis Morley*, then became and was seised in his demesne as of fee, of and in the said manor with the said liberties, royalties, members, and appurtenances; and the defendant *Francis Morley* being so seised as aforesaid, he, the defendant *Francis Morley*, in his own right, and the other defendants as the servants, and by the command of the defendant *Francis Morley*, afterwards, at the several times when &c. in the declaration mentioned, the same being reasonable and proper times in that behalf, broke and entered the said close in which &c., for the purpose of hunting and fowling therein—justifying the trespasses set forth in the declaration.

Special demurrer: assigning for causes, that it appeared by the plea that the said *W. P. Powlett*, at the time of the making and passing of the act of parliament in that plea first mentioned, was seised in his demesne as of fee of and in the premises whereof the said close in which &c., then was parcel, and if he was so seised thereof, then in respect of such seisin, and as the owner of the premises whereof the said close in which &c. then was parcel, the said *W. P. Powlett* then was entitled to do in, upon, and with the said close in which &c., whatever he might think fit; but he the said *W. P. Powlett* then neither had, nor could by law have, any distinct or

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specific right, liberty, or privilege, other than his right as owner, by virtue or in respect of which the said *W. P. Powlett*, his heirs, or assigns could or would be entitled to do or commit, or lawfully might do or commit in the said close in which &c., acts or trespasses, such as in the declaration mentioned, or any part of them; that it does not appear in or by the plea that the said *W. P. Powlett*, at the time of making the said act of parliament in the plea first mentioned, had any right, liberty, or privilege in, upon, or over, or to be exercised in, upon, or over the said close in which &c., or the premises whereof the same was parcel, other than and except his rights as owner and proprietor thereof seised in his demesne as of fee; that it does not appear in or by the plea that the said *F. Morley*, at the time when &c., or at any of them, had any right, title, liberty, or privilege whatsoever by virtue whereof he was entitled to, or lawfully could at the said times when &c. do or commit or authorise the other defendants, or any of them, to do or commit the said trespasses in the declaration mentioned, or any of them; and that it does not appear by the plea that the defendants, or any of them, at the said times when, &c., or at any of them, had any right or title to the said close in which &c., or to do or commit therein, the said trespasses in the declaration mentioned, nor does that plea contain any good or sufficient answer to the declaration or the trespasses therein mentioned. Joinder in demurrer.

Talfourd Serjt., in support of the demurrer. The first question intended to be raised upon this demurrer is, whether the plea can be considered as amounting, in effect, to a plea of *liberum tenementum*, so as to call upon the plaintiff, in replying, to set out his title. It is submitted that the plea does not sufficiently shew the legal seisin to be in the lord. It does not directly allege that

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the defendant *Morley* is seised in fee of the close in question, but only seeks to do so argumentatively. The plea, however, shews that the plaintiff is in the lawful possession of the close; for it alleges that an allotment was made under the inclosure act to the lord, in satisfaction of his right to the soil of the wastes, and that the *locus in quo* was allotted to one *Ince*, who, having power to sell the allotment before award made, would seem to have sold and conveyed it to the plaintiff. It consequently appears, on the face of the plea, that the plaintiff had such a possession of the close as would enable him to maintain trespass.

The more important question is, whether the defendant *Morley*, as lord of the manor, has a right to enter the allotments for the purpose of hunting and fowling. There is no averment in the plea that, at the time when the inclosure act was passed, the lord had a right of free warren, which might possibly have made it a good plea. It is clear, as a general proposition, that when the soil is divested out of a lord of the manor by an inclosure act, all rights incident to the soil are also divested; and here, the right which the lord possessed before the inclosure to hunt and fowl in the *locus in quo*, being in respect of the soil, was clearly extinguished upon the allotment thereof to *Ince*. *Townley* v. *Gibson* (*a*) and *Doe dem. Lowes* v. *Davidson* (*b*) shew that unless rights, which are part of the ownership of the soil, are expressly reserved under inclosure acts, they pass with the soil to the parties to whom allotments are made. In the latter case, Lord *Ellenborough*, in speaking of the clause reserving the lord's right, on which the question there turned, says, "the words 'in as ample a manner as if the act had not been made' cannot confer any new right, but reserve only such rights as

(*a*) 2 *T. R.* 701. (*b*) 2 *M. & S.* 175.

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he had before." Here, the words "rights, royalties, with free warren and liberty of hunting, hawking, fishing, and fowling," are clearly governed by those which follow, namely, "to the said manor, or to the lord or lords thereof, for the time being, incident, belonging, or appertaining." The word "rights" cannot, in strictness, refer to any thing which a party possesses in respect of the ownership of the soil. In *Bourne* v. *Taylor* (*a*) Lord *Ellenborough*, speaking of the term "liberty," says, "it imports, *ex vi termini*, that it is a privilege to be exercised over another man's estate. A man's right of dominion over his own estate is never called a liberty." Again, the clause saving the lord's rights must be taken to refer to such rights only, incident to the manor, as were in existence at the time that the act passed. That a right of free warren is not necessarily incident to a manor appears from *Morris* v. *Dimes*. (*b*) *Taunton* J. there says, "The general words which occur are no more than such as are found in all conveyances of manors. Even the word "warren" does not occur; although it often does occur, when there is no pretence that a warren legally exists." So here, there can be no doubt that general words, descriptive of a variety of rights, were introduced into the saving clause without reference to whether or not such rights had any existence. It is submitted that as the reservation extends only to rights incident to the manor, and the defendants have not alleged that the lord had a right of free warren over the close in question, and as all rights attached to the soil were extinguished upon its allotment, the defendants have made out no justification of the trespasses which they have committed.

W. H. Watson (*Channell* Serjt. was with him) *contrà*. With respect to the first point, the plea gives colour to

(*a*) 10 *East*, 205. (*b*) 1 *A. & E.* 654., 3 *N. & M.* 671.

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the plaintiff, and shews that he was in possession of the allotment, but that the freehold was still in the defendant *Morley* as lord of the manor. It is clear that until the award, the freehold of allotments made under inclosure acts remains in the lord; and if so, he has a right to enter. The act, in giving an allottee power to sell or mortgage before award made, takes it for granted that he possesses no estate or interest until after the award; for if he took an estate or interest previously, there would be no occasion to give him a power to sell or mortgage. [*Maule* J. An allottee may take no estate or interest, but he may have an exclusive possession given him by the act. It is clear that here he may sell and convey the fee to a purchaser previously to the award being made.] The meaning of the clause empowering allottees to convey before the award is, not to dispense with the award, but that when the award is made, it shall have the effect of conferring a title upon the purchasers of the allotments. If it were held that all allottees could make a perfect conveyance of their allotments before award made, the award would become entirely nugatory. *Farrar* v. *Billing* (*a*) shews that although an inclosure act authorises an allottee to sell and mortgage, it gives no title before the award is made. There, a local inclosure act directed that the commissioners, by notice, might cause all rights of common to be extinguished, and might then allot the waste lands among the proprietors, and that the owners might fence their allotments after they had been marked, staked out, and confirmed, and *before the signing of the award*, and might also, within three months *before the execution of the award*, sell and convey their interests in the allotments, the commissioners being thereby authorised to allot to the purchasers, and the

(*a*) 2 *B. & Ald.* 171. See *Doe* v. *Neild*, *post*.

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latter, *after the execution of the award*, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that where the allotments were copyhold, the deed should be inrolled in the court-rolls of the manor, and that the purchaser should be admitted tenant thereto at the same time as the other allottees of copyhold lands, viz. *after the execution of the award.* It was held that this authority to inclose and so to enjoy in severalty, and the power to sell and convey might well (considering the language in which that power was given) be enjoyed and exercised without the legal seisin of the land; and that therefore, these provisions not sufficiently countervailing those of the general inclosure act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award. [*Maule* J. In that case issue was taken on the soil and freehold; but that is not so here. In your plea you do much more than give colour. The case that you have cited shews that this plaintiff had a right to the exclusive possession.] There is no interest vested in the allottee so as to defeat the seisin of the lord; and if the freehold still continues in the latter, he may enter and exercise all his rights.

With regard to the more material point, it may be admitted that a party cannot have an incorporeal right in his own soil; and that the right which the lord had of sporting over the wastes previously to their inclosure, was a right incidental to the soil. But the question is, whether it was not the intention of the parties, and whether it is not the fair construction of the act, that such right of sporting should be reserved to the lord. It clearly appears that the lord did not part with all his interest in the soil; for one eighteenth part of the waste land was to be allotted to him in satisfaction of his right to the soil, "except as thereinafter was reserved to him." If the argument on the other side is well founded,—that

the reservation only preserves such rights as are incidental to the manor, — the reservation would be entirely nugatory. It is submitted that the saving clause reserves to the lord all the rights therein enumerated, being rights which he possessed at the time of the passing of the act; not meaning, strictly speaking, the rights which a party has in the land of another, but the rights of hunting and fowling, &c., which he enjoyed as owner of the soil. In a private act the reservation would operate as a grant; and this act is to be constructed in the same manner as a deed between the parties. The eighth and eleventh sections of the game act, 1 & 2 *W.* 4. *c.* 32., evidently refer to rights of this nature. *Morris* v. *Dimes* does not apply. That case merely decided that where there is a free warren in gross, it will not pass as appurtenant to a manor. The question here is, whether the meaning of this saving clause is not that the rights therein specified — being not merely rights appurtenant to the manor, but rights also which were enjoyed in respect of the ownership of the soil, — were intended to be reserved, or excepted out of the wastes upon their inclosure.

Talfourd, in reply. *Doe dem. Harris* v. *Saunder* (*a*) shews that the allottee became seised of the allotment from the time that he was put in possession. It is said that the words "except as thereinafter was reserved to him," shew that the lord did not part with all his interest in the soil; but those words are satisfied by that part of the reservation relating to the mines under the allotments. (*b*) The other general words contained in

(*a*) 5 *A.* & *E.* 664., 1 *N.* & *P.* 119.

(*b*) This part of the reservation was not set out in the plea, but it was agreed that such part, and also a clause in the act giving the owners of allotments compensation for the damage to be done to their lands by working the minerals, should be taken to be part of the record.

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the saving clause shew that the terms "with free warren," &c., have no reference to rights actually in existence. [*Maule* J. The act says that the lord is to have them in as full a manner, not as he *had* enjoyed them, but as he could or might have enjoyed if the act had not been made.] The provisions of the game act have no bearing on the question.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

Two points have been raised upon the demurrer to the defendants' plea. In the first place it is contended that the facts disclosed by the plea shew that the freehold of the plaintiff's close is still in the defendant *Morley* as the lord of the manor, and that the effect of the plea is the same as that of a plea of *liberum tenementum*, so that the plaintiff ought to have set out his title in the replication; and in the second place (which is the real point in contest between the parties), that, under the saving clause in favour of the lord's manerial rights, the liberty of hunting and fowling over the plaintiff's close exists in the lord, notwithstanding the inclosure of the waste.

As to the first point, it appears to us to be immaterial to consider whether the plea does or does not shew the legal seisin of the freehold to be still vested in the lord; because, at all events, the plea shews the plaintiff is entitled to the sole and exclusive possession of the close in which &c.; which is all that is necessary to enable him to maintain an action of trespass. The plea distinctly alleges that the allotment of the *locus in quo* was duly made under the local inclosure act to one *Ince*, "who took possession of and occupied the said close in which &c., in severalty, under and by virtue of the said allotment and division; and that from the time of such

allotment until and at the said time when &c. the said close in which &c. has been possessed and occupied in severalty by *Ince* and the plaintiff and those claiming under *Ince*, under and by virtue of the said allotment."

Whether, therefore, upon the proper construction of the general inclosure act, 41 *G.* 3. *c.* 109., the legal seisin of the freehold is in the allottee or those claiming under him, or whether, by reason of the non-execution of the award, the freehold is still in the lord, appears to be immaterial for the purpose of this action. And this distinguishes the present case from that of *Farrar* v. *Billing* (*a*), cited by the defendants; in which the precise issue raised upon the record was, whether the soil and freehold in the lands in which the distress had been taken, was or was not in the allottee under the inclosure act; and in which case the court expressly observe, in giving their judgment, "that the allottee might have such a right to the exclusive possession and enjoyment as would authorise him to distrain the plaintiff's cattle, and to justify the distress by a plea specially framed upon the acts of parliament, without having a legal or actual seisin:" and the effect of the defendants' plea in this case is, to shew that the plaintiff has such exclusive right (*b*) in himself; which is quite sufficient to maintain trespass.

Upon the second and principal question in the case, we are of opinion that the right of hunting or fowling over the allotments of the moor or common is not reserved to the lord of the manor by the saving clause of the inclosure act set out in the plea. It is the manifest object of that clause to save to the lord all those manerial rights which he possessed before the inclosure as lord of the manor, other and except the right to the soil. The saving clause gives no new royalty or ma-

(*a*) 2 *B.* & *Ald.* 171. (*b*) *Vide post*, 157. (*a*).

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nerial right to the lord which he did not possess before: it only reserves such as he was before entitled to. If he had no market or fair before, if he had no right of free warren before, it is needless to say, the clause referred to confers none. So, if before the act passed, he had no liberty of hunting, hawking, fishing, and fowling over the moor or common "to the said manor, or to the lord thereof, incident, belonging, or appertaining," he acquires no such right under the clause in question. Now it would be against all legal construction, to hold that the power of the lord of the manor to hunt or shoot over a waste or uninclosed common within his own manor, was merely a "licence or liberty" incident to him as lord: it is a mode of direct enjoyment of his own property. The soil of the waste or common is his, subject only to the right of the commoners to take the herbage by the mouths of their cattle; and the right in the lord to walk or ride over it, in every direction, and at all times, is the same right which he has over his other demesne lands, and not a mere liberty or easement. The statute, if it had intended to grant the new lord a new liberty or licence of this nature after the soil had become the property of those to whom it was allotted, would have employed proper words to create such new liberty or easement. The statute, if it had intended to grant the new lord a liberty or licence of this nature, after the soil had become the property of those to whom it was allotted, would have employed proper words to create such new liberty; as we find, in fact, it has done in this very clause, for the purpose of giving the right of exclusively winning and working minerals under the new allotments, with all other powers necessary and convenient thereto; and in which case also, the statute further proceeds to give compensation to the owners of the allotments for the damage done to the soil; which it probably would have done for the exercise of the right

of hunting and fowling, if it had been intended to grant a new liberty of that description. The statute certainly uses the word "common" in a sense not strictly legal, when it gives the lord an allotment in compensation in lieu of a right of common *over his own soil.* But that word has, for a long series of years, obtained a sense somewhat larger than its strict original meaning, and the statute having expressly directed such compensation to be made, the best construction that the law will permit, must be put upon that express enactment; but that circumstance can furnish no authority for a wider and more extensive construction of the word "liberty," where no such express enactment is made.

Upon the whole, we think that judgment must be given for the plaintiff.

Judgment for the plaintiff. (*a*)

(*a*) Bare possession is sufficient to support trespass against a mere wrongdoer. *Harper* v. *Charlesworth*, 4 *B.* & *C.* 574. It has never been expressly decided that an allottee in actual possession, under an inclosure act empowering him to sell and mortgage, can, before award made, maintain trespass against one who has the actual and immediate seisin of the freehold. In *Farrar* v. *Billing*, 2 *B.* & *Ad.* 171., the court say, *obiter*, "that the allottee *might* have such a right to the exclusive possession as would authorise him to distrain the plaintiff's cattle (as damage feasant), and to justify the distress made, by a plea specially framed under the acts of parliament, without having a legal or actual seisin." The plea in the principal case, admits a possession *de facto*, and that *Ince* and those claiming under him possessed the close "under and by virtue of the allotment and division;" which appears to be a sufficient admission, as against the parties by whom it is made, although no alienation by *Ince* is alleged, and no clause of the act is stated, which expressly gives authority to an allottee to *take* possession. And see *Doe dem. Sweeting* v. *Hellard*, 9 *B.* & *C.* 789., 2 *M.* & *R.* 736.; *Rex* v. *W. M. Pitt*, 5 *B.* & *Ad.* 568. 2 *N.* & *M.* 363.

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May 29. G. GIBSON and W. W. MARTIN, Assignees of T. HARRIS, a Bankrupt, *v.* G. A. MUSKETT.

A., an insolvent trader, calls a meeting of his creditors, and offers a composition of 7*s.* 6*d.* in the pound, to which the majority of the creditors present assent, and his property is advertised for sale. *B.*, one of the dissenting creditors, makes an affidavit, and gives a notice under 1 & 2 *Vict.* *c.* 110. *s.* 8. The sale proceeds, and the auctioneer, with the proceeds of the sale, and other moneys collected by the trader, pays 7*s.* 6*d.*, in the pound to *C.* and thirteen other creditors: nineteen creditors refusing to take the composition. In an action by the assignees of *A.*, who had been made a bankrupt, against *C.* for money received to their use, the jury were told that the sale appeared to have proceeded in the hope that *B.*, notwithstanding the course he had taken, might be induced to acquiesce in the composition, and that unless *A.*, at the time that the payment was made to *C.*, considered bankruptcy *inevitable*, it was not a payment made in contemplation of bankruptcy. A verdict being found for the defendant, the court granted a new trial as upon a verdict against evidence, but not for misdirection; considering that the term "*inevitable*" might, under all the circumstances, be referred to the means *possessed by A.* of stopping the proceedings of *B.*

ASSUMPSIT for money had and received to the use of the plaintiffs as assignees, and upon an account stated with them in that character.

Plea: non assumpsit.

The plaintiffs, by their particulars, claimed 121*l.* 10*s.*, received by the defendant on the 5th of *April* 1839, being part of the estate and effects of the bankrupt.

At the trial, before Lord *Abinger* C. B., at the *Hertford* summer assizes, 1839, the following facts appeared: —

Harris, who was a grocer at *St. Albans*, and kept an account at the banking-house of the defendant in that town, becoming embarrassed, called a meeting of his creditors in *February* 1839, and offered 7*s.* 6*d.* in the pound. The defendant and the majority of the creditors present at the meeting assented to this proposal; but others, amongst whom was the plaintiff *Martin*, the largest creditor except the defendant, held out. *Harris* nevertheless, on the 11th of *March*, employed *Crawley*, an auctioneer, to advertise and sell his effects, and to pay 7*s.* 6*d.* in the pound to such creditors as chose to accept it. On the 15th of *March*, *Harris* was served, under the 1 &

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2 *Vict. c.* 110. *s.* 8. (*a*), with a copy of an affidavit of debt for 251*l.* 12*s.* 11*d.* (sworn on the *thirteenth*), and a notice dated the *twelfth*, requiring immediate payment of the debt mentioned in the annexed copy of an affidavit of bankruptcy. Notice was given to *Crawley* not to proceed with the sale of, or to part with, any effects of *Harris*. Notwithstanding the notice, *Crawley*, on the 21st, sold the property, which realised 199*l.*, and with that sum, and with about 150*l.* collected by *Harris*, *Crawley*

(*a*) Enacting "That if any single creditor, or any two or more creditors, being partners, whose debt shall amount to 100*l.*, or any two creditors whose debts shall amount to 150*l.* or upwards, or any three or more creditors whose debts shall amount to 200*l.* or upwards, of any trader, within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her majesty's courts of bankruptcy that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid; and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice requiring immediate payment of such debt or debts: and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the court of bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with such costs as shall be given in the same, or to render himself (see *Ouston* v. *Coates*, 10 *A. & E.* 198., 2 *P. & D.* 198.) to the custody of the gaoler of the court in which such action shall have been or may be brought, according to the practice of such court (see *Saunderson* v. *Parker*, 9 *Dowl. P. C.* 495.), or within such time and in such manner as the said court, or any judge thereof, shall direct: after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy *on the twenty-second day after service* of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise."

These provisions are materially altered by the tenth and following sections of the new bankrupt act, 5 & 6 *Vict. c.* 122. There can now be no *render* by the sureties.

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paid 7*s.* 6*d.* in the pound to those creditors who would accept it. Fourteen creditors, whose demands amounted to about 800*l.* accepted, and twenty-one creditors, for about 900*l.* refused, the composition. Among the former class was the defendant, to whom *Crawley*, on the 5th of *April*, paid a dividend of 121*l.* 10*s.* upon 923*l.* 17*s.* 10*d.*, the balance of *Harris*'s banking account with the defendant.

On the 9th of *April* a fiat was granted against *Harris*, under which he was adjudged a bankrupt.

For the plaintiffs it was contended that two acts of bankruptcy had been committed, of which the defendant, before the payment of 121*l.* 10*s.*, had notice; the first on the 21st of *March* by the sale of *Harris*'s stock in trade; the second, by the lapse of the twenty-one days, which, it was contended, by law, created a complete act of bankruptcy on the *fifth* of *April*, the day on which the money was paid; and that, supposing no act of bankruptcy to have been committed before the *sixth* of *April*, the payment was made in contemplation of bankruptcy by way of fraudulent preference. Lord *Abinger* C. B. ruled that the sale being for a valuable consideration, was not an act of bankruptcy; and that no act of bankruptcy had been committed on the 5th of *April*; as he considered, that, in computing the twenty-one days, the 15th of *March*, the day on which notice had been served, should be left out of the calculation. But upon this point he gave the plaintiffs leave to move to enter a verdict for 121*l.* 10*s.* if the jury should find, upon the rest of the case, for the defendant. Upon the remaining point the learned judge told the jury that their verdict would depend upon the question, whether the 121*l.* 10*s.*, paid to the defendant by the authority of *Harris*, was so paid with a view to a fraudulent preference, and also in contemplation of bankruptcy; that formerly acts of bankruptcy were acts done by the trader himself, and

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the question would then have been, whether he contemplated doing any of such acts; but by the late statute of the 1 & 2 *Vict. c.* 110. the creditor of a trader to the amount of 100*l.*, might place himself in a position to obtain a fiat unless the debt were paid, or security given, within a certain period; that *Martin*, by filing an affidavit and serving notice, had placed himself in a position to obtain a fiat; but that *Harris* might really expect that *Martin*, seeing that the estate would not produce more than 7*s.* 6*d.* in the pound, might desist from his proceeding, and accept the composition; and that unless the jury were of opinion, that, under the circumstances in which *Harris* was placed, he must, as a reasonable man, have considered bankruptcy inevitable, the defendant was entitled to a verdict. A verdict having been found for the defendant,

Wilde Solicitor-General, in *Michaelmas* term following, moved for a new trial (*a*) on the ground of misdirection, and that the verdict was against evidence. A question arose at the trial as to which would be the twenty-second day after the service of the affidavit and notice on the 15th of *March*. He then read the eighth section of the 1 & 2 *Vict. c.* 110. [*Maule* J. That appears tolerably plain. The twenty-second day would be the *sixth of April*.] Nothing probably will turn upon that question here; because, supposing the payment to be made after an act of bankruptcy, it would be a good payment up to the date of the fiat, by the eighty-second section of 6 *G.* 4. *c.* 16. (*b*),

(*a*) *Wilde* stated to the court that he felt a difficulty in availing himself of the leave reserved to enter a verdict for the plaintiffs, on the ground that the bankruptcy was complete on the 6th of *March*, and he conceived that the leave must have been given under some misapprehension. The point really reserved was, whether the act of bankruptcy was complete on the 5th of *April*.

(*b*) Enacting "that all payments really and *bonâ fide* made, or which hereafter shall be

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unless it was a fraudulent preference. Though it is not material whether the twenty-second day expired on the 5th or on the 6th of *April*, it is very material to consider whether, when the fiat issued on the 9th, it made the act of bankruptcy complete from *one* of those days. The Lord Chief Baron, in presenting the case to the jury, repeatedly pressed upon their consideration that there would be no act of bankruptcy until the fia issued; not giving the due effect to the fiat, when issued, viz. in making the default on the twenty-second day to be an act of bankruptcy as of that day, and not an act of bankruptcy as from the date of the fiat. If a man is in circumstances which call his attention to the probability of his becoming bankrupt, and, in order to guard against the effect of such probable bankruptcy, he selects certain creditors, and pays them a greater amount than they would get under a fiat, or pays them by anticipation, in order to give them the advantage of

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made, by any bankrupt or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed,"— "and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed." It did not appear that the defendant, at the time the 121*l.* 10*s.* was paid, had notice of the proceedings commenced by *Martin*; and, if he had been apprised of what *Martin* had done, *quære*, whether that would have amounted to notice of an act of bankruptcy, without notice that *Harris* had not paid or secured *Martin*'s debt; and, even then, whether there was a complete act of bankruptcy, capable of being the subject of notice until a fiat was obtained. But, as to the latter point, it may be observed that an act is, strictly speaking, an act of bankruptcy until a fiat is granted, and the only difference in this respect, between this and other acts of bankruptcy, is, that the fiat which is to give efficacy to the act of bankruptcy, is in this case limited to a narrower extent of time.

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time; if he does this to guard against even a probability in his own mind, it is submitted that it is a fraudulent preference in *contemplation* of bankruptcy. (*a*) A man who wishes to favour particular creditors in the event of bankruptcy, will, in general, do all in his power to prevent or delay the bankruptcy; but, by so doing, he is endeavouring, in fraud of the statute, to counteract its provisions for an equal distribution. Here, a trader, after unsuccessfully attempting to make a bargain with his creditors for 7*s.* 6*d.* in the pound, possesses himself of the whole of his assets, and distributes those assets amongst a few selected creditors; and when the fiat is granted, not a shilling remains for the other creditors. The Lord Chief Baron told the jury that they were to consider, whether *Harris*, at the time he directed these payments to be made, thought it *more probable* that *Martin* would pursue his determination to make *Harris* a bankrupt, than that he would come in and take 7*s.* 6*d.* in the pound; as unless *Harris* so thought, he could not be said to contemplate bankruptcy. His lordship added that he did not see how the jury could say that *Harris necessarily* contemplated bankruptcy as *inevitable*. It is conceived that the learned judge was not correct in requiring that *Harris* should have necessarily considered bankruptcy as inevitable.

Supposing the case to have been correctly left to the jury, the verdict is not warranted by the evidence. Considering the steps taken by *Harris* afterwards, no reasonable man can doubt that bankruptcy was contemplated. A rule *nisi* having been granted,

Channell Serjt. (with whom was *Petersdorff*) now shewed cause. The act of bankruptcy was not com-

(*a*) *Quære*, whether it is not a preference in contemplation of bankruptcy, where the trader does an act in favour of a creditor which he would not have done if he had been certain that no fiat would be obtained against him. *Post*, 168.

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plete on the 5th of *April*, on which day the defendant received the 121*l.* 10*s.* from the auctioneer. In ascertaining the twenty-second day, the day on which the trader is served with the copy of the affidavit and notice, is to be excluded. Though some former decisions are not to be easily reconciled, it is now settled by two recent cases, that the day on which a contract is made or an act done, is to be excluded from the calculation; *Webb* v. *Fairmaner* (*a*), *Blunt* v. *Heslop.* (*b*)

A sale by a trader of all his property is not an act of bankruptcy, though a mere assignment of such property would be so; *Baxter* v. *Pritchard* (*c*), *Rose* v. *Haycock.* (*d*) There was not here, in the language of the 6 *G.* 4. *c.* 16. *s.* 3., "any fraudulent gift, delivery, or transfer" by *Harris*, "of any of his goods or chattels, with intent to delay his creditors."

It is said that this was a fraudulent preference in contemplation of bankruptcy. *Harris* was not bound to believe, under the circumstances, that bankruptcy would take place; and the jury have found that he did *not* believe it. [*Tindal* C. J. Lord *Abinger* told the jury, that unless *Harris* considered bankruptcy *inevitable*, the payment was good.] The view of the case which the learned judge presented to the jury, was, substantially, correct. To constitute a contemplation of bankruptcy it is not sufficient that a trader finds himself in a position in which bankruptcy *may* be the result; there must be an expectation that a fiat *will* issue. *Harris* might well believe that *Martin*, notwithstanding the steps that he had taken, would see that it was for his advantage to accept the composition which had been proposed; and unless a fiat was obtained, the

(*a*) 3 *M.* & *W.* 473., 6 *Dowl. P. C.* 549.
(*b*) 8 *A.* & *E.* 577., 3 *N.* & *P.* 553.
(*c*) 1 *A.* & *E.* 456., 3 *N.* & *M.* 638.
(*d*) 1 *A.* & *E.* 460. n.

omission to pay or secure *Martin*'s debt, would be no act of bankruptcy.

Wilde Solicitor-General, in support of the rule. The learned judge's direction was clearly wrong; for the necessity that the bankruptcy should be inevitable, runs through the whole summing up. This case, when the facts are understood, does not admit of any doubt. A mistake has arisen from losing sight of the difference between the state of affairs when the 7*s.* 6*d.* was offered, and that which existed when the 121*l.* 10*s.* was paid. The question is, what was in *Harris*'s contemplation on the 5th of *April*, after he had paid 7*s.* 6*d.* in the pound to fourteen of his creditors. There was then no 7*s.* 6*d.* in the pound remaining for *Martin*, and the other uncompounding creditors. It is the object of the bankrupt laws to prevent such an unequal and arbitrary distribution of the assets. The rule is correctly laid down by *Bosanquet* J. in *Gibson* v. *Boutts* (*a*), where it is said, "If a man, believing himself to be *in danger* of bankruptcy, voluntarily hands over money for the purpose of securing a favoured creditor, that, in my opinion, is a payment made in contemplation of bankruptcy, within the meaning of the law as laid down on the subject of fraudulent preference. Here, the act done distinctly shews that. A trader is not to say, — I do not know whether bankruptcy will take place, but I will protect you." In this case, it is impossible to suppose that the trader acted upon a mere suspicion that bankruptcy *might* take place. On the part of the plaintiffs it is contended, that in this case bankruptcy *was* inevitable; but that it is sufficient that *Harris* acted under a wish to protect certain creditors against the *chances* of bankruptcy.

By an oversight (*b*) the motion was not made to enter

(*a*) 3 *Scott*, 224. (*b*) *Antè*, 161. (*a*).

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a verdict for the plaintiffs, upon the leave reserved with respect to the day on which the act of bankruptcy would be complete. It can now only present an additional ground for making the rule absolute for a new trial. The twenty-second day, on which the act was complete, was, the 5th of *April*. The statute declares that, unless *within* twenty-one days the debtor shall give bail or take certain other courses, he shall on the twenty-second day *after the notice*, be deemed to have committed an act of bankruptcy. Where something is to be done within a limited time *after a particular day*, that day is excluded in calculating the limited time; *Norris* v. *Hundred of Gawtry* (*a*), *Com. Dig.* tit. *Bargain and Sale* (B. 8.). (*b*) But where a time is limited *after an act done*, the day of the act is included; *Clayton's* case (*c*), *Norris* v. *Hundred of Gawtry* (*a*), 2 *Roll. Abr.* 520., *Osbourn* v. *Rider* (*d*), *Bellasis* v. *Hester* (*e*), *Rex* v. *Adderley* (*g*), *Goden* v. *Ferris* (*h*), *Castle* v. *Burditt* (*i*), *Saun-*

(*a*) *Hob.* 139.

(*b*) And see 2 *Inst.* 674.; *Thomas* v. *Popham*, *Dyer*, 218. *b.*; *Anon. Sir F. Moore*, 40. pl. 128.; *Dalison*, 41.; *Glassington* v. *Rawlins*, 3 *East*, 407.; *Higgins* v. *M'Adam*, 3 *Yo. & Jerv.* 1.; *Pellew* v. *Inhabitants of East Wonford*, 9 *B. & C.* 134., 4 *Mann. & Ryl.* 130.; *Gould* v. *Hole*, 4 *Mann. & Ryl.* 301. n.; *Rex* v. *Inhabitants of Cumberland*, 4 *Nev. & M.* 179.; *Prangley, In re*, 4 *A. & E.* 781.; *Regina* v. *Justices of Shropshire*, 8 *A. & E.* 173., 3 *N. & P.* 286.; *Rhodes, ex parte*, 4 *Deac.* 125.; *Whitby, ex parte*, *ib.* 139., 1 *Mont. & Chit.* 671.; *Collins* v. *Rose*, 5 *M. & W.* 194.; *Young* v. *Higgon*, 6 *M. & W.* 49., 8 *Dowl. P. C.* 212.; *Wilkinson* v. *Britton*, *antè*, Vol. 1. 557.; 20 *Vin. Abr.* 266, 267.

In the *Roman* law, the day of the act done appears to be excluded. "Ubi lex duorum mensium mentionem fecit, et qui sexagesimo *primo* die venerit, audiendus est. Ita enim rescripsit Imperator *Antoninus* (*Caracalla*) cum Divo patre (*Septimio Severo*)." *Dig. lib.* 50. tit. 17. l. 101. But in the *French* law the rule appears to be different. "Elle (la prescription) est acquise lorsque le dernier jour du terme est accompli;" *Code Civil*, No. 2261. And see *Cod.* lib. 7. tit. 63. l. 1.; *Cujacius, in tractatu divers. temp. præscript.*; *Ordonnance de* 1667, tit. 3. art. 6.

(*c*) 5 *Co. Rep.* 1.

(*d*) *Cro. Jac.* 135.

(*e*) 1 *Ld. Raym.* 280.

(*g*) 2 *Dougl.* 465.

(*h*) 2 *H. Bla.* 14.

(*i*) 3 *T. R.* 623.

ders v. *Saunders* (*a*), *Smith* v. *Wiltshire* (*b*), *Com. Dig.* tit. *Temps.* (A.).

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TINDAL C. J. It appears to me that the jury have come to an improper conclusion, and that this case ought to be submitted to a new trial. The money was paid by *Harris* to *Muskett*, on the 5th of *April*. We ought to consider what was his situation at that time with respect to *Martin*, the creditor who sued out the fiat.

When *Harris* made the payment on the 5th of *April*, he knew that he had been served, by *Martin*, with a notice requiring payment of his debt. By this notice he was informed that unless, within twenty-one days after such service, he paid, secured, or compounded for the debt or entered into a bond, an act of bankruptcy would be committed, provided a fiat was sued out within a certain time. On the 5th of *April*, therefore, when the payment was made, *Harris* knew, that on the following day (*c*), *Martin* would be in a situation to sue out a fiat against him, unless he complied with one of three conditions, all of which he was most incompetent to perform. He could not pay the debt, having exhausted his money. He could not secure or compound for the same to the satisfaction of *Martin*; for by giving the notice, *Martin* had shewn that he was unwilling to do so, and had determined not to accept the composition previously offered. He could not enter into a bond with sureties such as a commissioner of the court of bankruptcy should approve, because there was not time. *Harris*, having been served with the notice on the 15th of *March*, and being aware that on the 11th the auctioneer had received notice not to go on with the sale, it is impossible that *Harris* should not know that

(*a*) 2 *East*, 254.

(*b*) 2 *Bro. & B.* 621., 5 *B. Moore*, 322.

(*c*) The act of bankruptcy appears therefore to have been considered as not complete on the *fifth*. And see *antè*, 161.

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it was the intention of *Martin* to proceed adversely, and to issue the fiat.

Then the question is, whether the money was not paid in contemplation of bankruptcy, that is, under such circumstances that any prudent man, taking a reasonable view of his situation and of the surrounding circumstances at the time, might fairly expect that bankruptcy would follow. That seems to me to be sufficient. I think therefore that another jury should exercise their judgment upon that point.

But I am not prepared to say that the direction is of such a description that we ought to make any distinction between this and the ordinary case of a new trial granted on account of the insufficiency of the evidence to support the verdict. In two or three parts of the learned judge's address to the jury, he said that they must be satisfied that bankruptcy was inevitable. I think the term "inevitable" was used there, not *simpliciter*, but rather *secundum subjectam materiam;* that is, with respect to the act of bankruptcy, — which depended, not on the act of *Harris* himself, but on an act by a third person. I think, that what was passing in the mind of the judge, and what the jury might understand, taking the whole together, is, in substance, this — "If you think that *Harris* had bankruptcy in contemplation at the time, you must find for the assignees. But supposing you do not do that, yet if you are satisfied that he thought the bankruptcy was *inevitable*, still you must find for the assignees." Although in particular parts of the learned judge's address, the point as to the inevitable expectation of bankruptcy is strongly put; yet, taking the whole together, I cannot call it a misdirection.

COLTMAN J. I am of the same opinion. I think the jury have come to an erroneous decision upon the matter of fact; and, though strong observations appear to

have been made upon the facts by the Lord Chief Baron, I am not prepared to say that he did not, on the whole, make the jury understand correctly the nature of the point they had to decide; for he closes his summing up by saying, "If you think, on the other hand, that he did not intend a fraudulent preference of a creditor, and he did not intend to commit bankruptcy at the time, and did not conceive (*a*) that *Martin* would proceed to make him a bankrupt, then you ought to find for the defendant." So far, that is correct. It is easy to understand that the jury may have been led to the conclusion they drew, by thinking that *Martin* had dealt harshly with *Harris*. They probably thought that the original offer of 7*s*. 6*d*. was a fair proposal. Although that may be a view of the case likely to be taken by a jury, it cannot be supported in point of law. In paying to the defendant the 7*s*. 6*d*., which he was willing to pay to all his creditors, *Harris* was, in consideration of law, guilty of a fraudulent preference.

ERSKINE J. I also think that the jury have come to a wrong conclusion, and that the case ought to be submitted to another jury.

MAULE J. I am of the same opinion. It does not appear to me the direction of the learned judge was erroneous. The act of bankruptcy was of a peculiar nature, not an act done by the bankrupt, but by some one else. In effect, the judge put this to the jury, — "If you think that he meant to commit an act of bank-

(*a*) *Quære*, whether, after what had been said respecting the necessity of bankruptcy being contemplated as inevitable, the jury would not understand by this, that they must be satisfied that *Harris* conceived that the proceedings under the statute, *even taking into consideration the probable conduct of Martin*, would *inevitably* terminate in bankruptcy.

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ruptcy, or if you think that he contemplated that *Martin* would make him a bankrupt, then it was a payment in contemplation of bankruptcy." That was what, in substance, the learned judge said to the jury, and it appears to me to be quite correct. It is said that he used the word "inevitable;" and it is put as if the learned judge had told the jury that the payment would not be a payment in contemplation of bankruptcy unless *Harris* knew that bankruptcy was inevitable. That is not a fair or a grammatical construction of what was said. The meaning is — that if *Harris* intended to commit an act of bankruptcy, or if he knew that *Martin*'s proceedings could not be stopped by him, it was a payment made in contemplation of bankruptcy. That, I think, is explained by the passage read by my brother *Coltman* from the judge's summing up. Probably, if his lordship had taken a different view of the facts, and had pressed those facts to the jury in the way they have been to-day, the jury might have come to a different conclusion. All that he has done, or rather omitted to do, consists in having given no opinion, on the matter of fact, to the jury; but that is not a misdirection.

Rule absolute, on payment of costs. (*a*)

(*a*) The cause went down to a second trial, when a verdict was again found for the defendant, which was also set aside, and a third trial granted; *vide post*, Vol. 4.

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May 28.

In a declaration in an action removed by writ of *pone* from the sheriff's court, it need not be alleged that the causes of action arose within the jurisdiction of that court.

So, although the declaration recited that the action was commenced by writ of *justicies*.

Held, that the indorsee of a bill of exchange cannot maintain an action of *debt* against the acceptor.

ASSUMPSIT, by the indorsee against the acceptor of a bill of exchange, commenced, by *justicies*, in the county court; in which the entry was as follows:

Be it remembered, that *John Powell*, heretofore, in the court of *W. Evans* and *J. Whieldon*, sheriff of the county of *Middlesex*, holden at &c. on the 21st day of *November*, in the third year of &c. before (the suitors present) complained by writ of our sovereign Lady the Queen, of *justicies*, to the sheriff of the said county directed, of *Jacob Ancell*, in a plea of debt, of 30*l.*, which he owed to him the said *John Powell* and unjustly detained (*a*) as it was said; which said plaint and writ of *justicies*, at the prayer of the plaintiff, by virtue of a writ of *pone* of the said Lady the Queen to the said sheriff directed, was *laid* before the justices of the said Lady the Queen at *Westminster* on the 20th of *November* 1840. (*b*) Now, at this day, that is to say, on the 14th day of *January* 1841, before the Queen's justices at *Westminster*, come, as well the plaintiff, by *J. S.*, his attorney, as the defendant, by *S. H. W.* his attorney. And thereupon the plaintiff, by his attorney aforesaid, complains of the defendant, in a plea of debt; and he demands of the defendant 30*l.*, which he owes, &c. For that whereas *N. Brewer*, on the 30th of *July* 1839, made his bill of exchange, and directed the same to the defendant; and thereby required the defendant to pay to his order

(*a*) The writ of *justicies* in *debt* does not shew that the cause of action arose within the jurisdiction. In assumpsit, case, and trespass, it is otherwise.

(*b*) As the uniformity of process act applies to actions *commenced* in the superior courts, there seems to be no reason why this declaration should not have stated, simply, that the defendant was summoned, without noticing the *justicies*. *Vide post*, 174. (*a*).

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10*l.*, two months after the date thereof; which period is now elapsed; and the defendant then accepted the said bill, and the said *N. B.* then and there indorsed the same to the plaintiff; of all which premises the defendant then and there had notice; and the defendant then and there promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof, and of his acceptance thereof. And that the defendant was, at the time of the commencement of this action, also indebted to the plaintiff in 20*l.* for money found to be due from the defendant to the plaintiff on an account stated between them. Which several moneys were to be respectively paid by the defendant to the plaintiff on request; whereby, and by reason of the nonpayment thereof, an action hath accrued to the plaintiff, to demand and have, of and from the defendant, the said several moneys, respectively, amounting to the sum of 30*l.* above demanded. Yet the defendant hath not paid &c.

Special demurrer, assigning for causes, — that although the action had been commenced in the county court of the sheriff of *Middlesex*, and removed into this court, it did not appear that the county court had any jurisdiction over the causes of action and matters of complaint in the declaration alleged, as it did not appear that the bill of exchange had been made, accepted, or indorsed, at any place within the jurisdiction of the county court; or that the defendant was indebted to the plaintiff, as in the last count mentioned, or that the account in that count mentioned, had been stated, at any place within the jurisdiction of the county court; and also that the causes of action in the declaration were misjoined, the first count being in an action upon *promises*, and for a breach of a *promise* alleged to have been made by the plaintiff to the defendant, and the last count being founded upon a *debt* alleged to be due from the defendant to the plaintiff, and the first count

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being by the plaintiff, as the indorsee of a bill of exchange, against the defendant, as the acceptor thereof, no *debt* was therein stated or appeared upon which *an action of debt* could be maintained, and the first count was a count upon *promises;* and in the last count no promise was stated or alleged, and the same was a count in *debt.*

Joinder in demurrer.

Stephen Serjt., in support of the demurrer. In every action brought in an inferior court it is clearly necessary to allege and prove that the cause of action arose within the jurisdiction of that court. The cases are collected in 1 *Wms. Saund.* 74. *a.* (*a*) This point is so clear that it will be unnecessary to say any thing upon the second ground of demurrer.

Manning Serjt., *contrà.* It is not denied that where a plaintiff declares in the county court, he is bound to shew, upon the face of his declaration, that the cause of action arose within the county. Whether the plaintiff did so declare in the present case, does not appear. Upon the removal of a cause, either by *pone per vadios,* or by *refalo, accedas ad curiam, habeas corpus,* or *certiorari,* in whatever stage the proceedings may be in the court below, even though the cause be at issue, nothing is sent up to the superior court except the plaint, when the action is commenced by plaint, or the writ and plaint, when the action is commenced by *justicies.* The parties being properly before the superior court, no question of jurisdiction can then arise, provided the cause be within the jurisdiction of such superior court. After the removal of a cause, therefore, the plaintiff always declares in the superior court, as if the

(*a*) And see *Salter* v. *Slade,* 1 *A. & E.* 608., 3 *N. & M.* 717.; *Read* v. *Pope,* 4 *Tyrwh.* 403., 1 *C. M. & R.* 302.

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action had originally been commenced there. [*Tindal* C. J. In the ordinary case of a replevin by plaint, in the inferior court, the cause of action is stated in the declaration, to have arisen within the jurisdiction of the county or franchise; but, in declaring again, after the cause has been removed, the allegations as to the jurisdiction need not be repeated.]

Stephen Serjt. admitting that the cases were not to be distinguished (*a*), proceeded with his second objection.

There is a misjoinder of counts. The first count is, both in form and in substance, a count in assumpsit. In form, because it expressly alleges a *promise* to pay according to the tenor and effect of the acceptance. In *Brill* v. *Neele* (*b*) it was held, that a count stating that the defendant was indebted for work and labour, and that being so indebted he promised to pay, though it went on to say, "whereby an action has accrued," could not be treated as a count in debt, and joined with other counts in debt. But, as a count in debt, this count is bad in substance. There being no privity of contract between the indorsee and the acceptor of a bill of exchange, an action of debt will not lie in any form. Though in *Priddy* v. *Henbrey* (*c*), an action of debt at the suit of the *drawer* of a bill of exchange against the acceptor, was supported, it was held in *Cloves* v. *Williams* (*d*), that such an action could not be brought by an

(*a*) The commencement of a declaration in replevin, is "*C. D.* was *summoned* to answer *A. B.* of a plea, wherefore he unjustly took and detained," &c. This form, which, strictly taken, would denote that the defendant was sued by *writ* of replevin, has always been used after a removal from the county court. If the objection, therefore, had been tenable, it could not have been raised on *demurrer* to such a declaration. Here, the apparent difficulty seems to have been created by noticing the *justicies* in the declaration. *Vide antè*, 171. (*b*).

(*b*) 3 *B. & Ald.* 208., 1 *Chitt. Rep.* 619.

(*c*) 1 *B. & C.* 674., 3 *D. & R.* 165.

(*d*) 3 *New Cases*, 868., 5 *Scott*, 68.

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nants made with their grantors, because covenants, being choses in action, were not assignable. But the statute of 32 *H.* 8. *c.* 34. after reciting that by the common law, no stranger to any covenant could take advantage thereof, but only such parties as were parties or privies thereto, gave to the grantees of the reversion "like advantages against the lessees, &c. by entry, &c. and by action for not performing other covenants and conditions expressed in the indenture of leases and grants, against the lessees and grantees, their executors, &c. as the lessors, &c. might have had." The effect of this statute has always been considered to be, to transfer the *privity of contract* to the assignees of the reversion. So, the privity of contract is transferred by the custom of merchants from the indorser to the indorsee. [*Tindal* C. J. The custom of merchants was recognised at the time that several cases were decided, all of which are against you.] They were not decided upon the ground now taken, namely, the supposed absence of privity of contract; therefore the principle of the transfer of that privity could not arise. In *Cloves* v. *Williams*, the only modern case cited in favour of the defendant, it was *assumed* that debt would not lie for the indorsee against the acceptor. The argument, however, turned upon a collateral point; no judgment was given, and both parties had leave to amend without costs.

It is true that there are several old cases in which it has been held that debt will not lie against the acceptor of a bill of exchange; and that, at the suit not merely of an indorsee, but of the drawer. Thus, in *Hard's case* (*a*), it is said, "Indebitatus assumpsit will not lie in any case except where debt lies; therefore, it lies not against the acceptor of a bill of exchange; for the acceptance is merely a *collateral* engagement. (*b*) But *indebitatus*

(*a*) 1 *Salk.* 23.

(*b*) But see *F. N. B.* 122 K., cited *antè*, 175. (*b*)

assumpsit lies against the drawer, who is really the debtor by the receipt of the money; and debt will lie against the drawer." The drawer of a bill *sells* at the current exchange, the right to receive a sum of foreign money at a particular time and place. Now, although he receives from the payee the price of the bill, he undertakes, not that *he* will pay the amount to the payee or his order, but that the drawee shall so pay. The action against the drawer is solely in respect of the non-performance of that engagement. He is collaterally liable, the acceptor, primarily liable. In *Brown* v. *London* there was no absence of privity of contract. That was an action by the payee against the acceptor; the plaintiff was therefore the party with whom the drawee, at the request of the drawer, *originally* contracted. The decision in *Brown* v. *London*, founded upon *Milton's* case, proceeded upon the broad ground, that the drawer, by accepting, does not constitute himself a *debtor* to any one. So, it is said in *Com. Dig. Dett* (B.), "Debt does not lie upon a bill of exchange against the acceptor; for the acceptance binds him by the custom of merchants, *but does not raise a duty.*" For this is cited *Hardres*, 485. That was an anonymous case (no doubt the same which is referred to as *Milton's* case, in *Brown* v. *London*) in 20 *Car.* 1. in the Exchequer. There, in an action for 100*l.* upon a bill of exchange accepted, the plaintiff declared, that by the custom of *England*, if a merchant send a bill of exchange to another merchant to pay another person, and the bill be accepted, he who accepts the bill does thereby become *chargeable* with the sum therein contained; and that a certain merchant drew a bill of exchange upon the defendant *payable to the plaintiff*, which bill the defendant accepted; *per quod actio accrevit.* And upon *nil debet* pleaded, a verdict passed for the plaintiff. A motion being made in arrest of judgment, *Hale* C. B.

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said, "Without doubt, if the common law or the custom of a place create a duty, debt lies for it without more ado; as in the case of a toll due by custom; 20 *H.* 7.; and so in cases of a certain sum due, by custom, for pound breach to the lord of the manor; or to a gaoler for bar fees. (*a*) But the great question here is, whether or no a debt or duty be hereby raised: *for if it be no more than a collateral engagement, order, or promise, debt lies not.* As in the case that has been cited of goods delivered by *A.* to *B.* at the request of *C.*, which *C.* promiseth to pay for if the other does not, for in that case a debt or duty does not arise betwixt *A.* and *C.*, but a collateral obligation only. In one case the acceptance of the bill amounts clearly to a promise to pay the money, but it may be a question whether it amounts to a debt or not; for if so, then it is assignable *to the king* or by *commissioners of bankrupts.*" The court took time to consider, and then delivered the following judgment: — "Afterwards, in *Hilary* term, 20 & 21 *Car.* 2. the court declared their opinions that an action of debt would not lie upon a bill of exchange accepted against the acceptor. But that a special action upon the case must be brought against him, for that the acceptance does not create a *duty* no more than a promise made by a stranger to pay, &c. if the creditor will forbear his debt. And he that drew the bill continues debtor, notwithstanding the acceptance, which makes the acceptor liable to pay it. And this course of accepting bills being a general custom amongst all traders, both within and without the realm, and having every where that effect as to make the acceptor subject to pay the contents. The court must take notice of that custom; but the custom does not extend so far as to create a *debt.* It only makes the acceptor *onerabilis* to pay the money. Though custom may give an action of debt, as in

(*a*) *Vide Sir William Capel's* case, *H.* 21 *H.* 7, fo. 14, pl. 20.

20 *Hen.* 7. 1. of toll; and so in case of a fine for a copyhold. Wherefore and because no precedent could be produced, that an action of debt had been brought upon an accepted bill of exchange, judgment was arrested." This case, which is the foundation of the whole series of decisions in favour of the doctrine that debt will not lie against the acceptor of a bill, *because an acceptance creates no duty*, is directly overruled by *Priddy* v. *Henbrey*, with which agrees *Clarke* v. *Lazarus*. (*a*) *Priddy* v. *Henbrey* is even a stronger case than the present, as the instrument declared on there was not, in strictness, a bill of exchange. A bill of exchange requires three parties, a drawer, a payee, and a drawee. An instrument by which the drawer directs money to be paid to his own order, is, in reality, a promissory note, or rather, an inchoate bill of exchange, with the name of the payee in blank. (*b*) Where a bill is accepted with the name of the payee in blank, the holder of the bill is an agent authorized by the acceptor to insert the name of the person with whom the latter contracts. So here, the drawer is the agent of the acceptor authorized by him to insert the name of a payee through the medium of an indorsement. That distinguishes this case from *Cloves* v. *Williams*, where the plaintiff was a *remote* indorsee. The minor circumstances relied on in *Priddy* v. *Henbrey* are entitled to no weight. When a bill of exchange is drawn "for value received," the latter words import that the drawer has received value from the payee, as the consideration for which the bill was drawn. The inserting of these words in a bill drawn payable to the order of the drawer, imports that value has been, or is to be, received from the party to whom he means to transfer the bill by his order. In the sense of "value received by the drawee

(*a*) *Ante*, vol. ii. p. 167. (*b*) *Vide* 3 *Nev. & M.* 38. n.

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from the drawer," it is not warranted by the custom of merchants, and a mere impertinent allegation. This view of that point was not, however, presented to the court, either in *Priddy* v. *Henbrey* or in *Highmore* v. *Primrose*. (*a*) The court will not uphold a doctrine founded solely upon *Milton*'s case and *Brown* v. *London*, after the principle on which those cases were decided, has been repudiated. Supposing a bill to be indorsed before it is accepted, as is often the case, the contract would then be immediately with the indorsee. [*Tindal* C. J. Here, the declaration states that the indorsement was *after* the acceptance.] That is an allegation which the plaintiff could not, by any mode of pleading, be compelled to prove. [*Erskine* J. referred to *Bishop* v. *Young* (*b*), and *Watkins* v. *Wake*. (*c*)] Before the doctrine of implied assumpsits an action of debt was the only remedy for the nonpayment of a sum due by simple contract. [*Maule* J. Was there ever a time when a promise could not be implied? See *Slade*'s case. (*d*)] In *Slade*'s case it was certainly found, by special verdict, that there was no promise in fact; but that decision has always been considered as stretching the law for the purpose of ousting defendants of their wager of law; an object which was not very obscurely avowed by the judges.

TINDAL C. J. It was also decided "in respect of infinite precedents (*e*);" and, in that respect, it is not unlike the present case. You cannot get over the authorities against you; you had better amend.

Rule to amend the declaration on payment of costs.

(*a*) 5 *M. & S.* 65.
(*b*) 2 *B. & P.* 78.
(*c*) 7 *M. & W.* 488.
(*d*) 4 *Co. Rep.* 92. *b.*
(*e*) These shewed that assumpsit had often been brought where the contract which formed the consideration of the alleged promise, would have supported an action of debt; they could not shew whether, upon non assumpsit pleaded, proof would or would not have been required of an *express* promise.

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JOHN HUNTER *v.* ROBERT NECK.

June 2.

CASE, for maliciously suing out a *ca. sa.* for 400*l.* and interest on 227*l.* 5*s.*, from the 21st of *February* 1838, upon a judgment in the Exchequer for 400*l.*, indorsed to levy 227*l.* 16*s.*, besides &c., which judgment had been paid and satisfied by the plaintiff to the defendant; whereby the plaintiff was taken and detained in custody until discharged by a judge.

A plea by which the defendant alleges that he is an attorney of another court, and privileged to be sued there, may be pleaded by attorney.

Whether a plea, strictly to the jurisdiction of the court, must be pleaded in person, and whether, if the plea is pleaded by attorney, the objection may be taken on demurrer, or can only be taken advantage of by an application to the court, *quære?*

Plea: "And the defendant, *by John Lewis his attorney*, says, that before and at the time of the commencement of this suit, he was, and from thence hitherto hath been, and still is, one of the attorneys of the court of our lady the Queen before the Queen herself at *Westminster*, in the county of *Middlesex*, and hath prosecuted and defended, and still doth prosecute and defend, divers suits and pleas in the same court before our lady the Queen, for divers liege subjects of our lady the Queen, as their attorney, and that he and all other the attorneys of the said court of our lady the Queen before *the* Queen herself, ought, by an antient and laudable custom, from time immemorial used and approved of, according to the laws and customs of this realm, and the liberties and privileges of the said court of our lady the Queen before the Queen herself, to be free and exempt from being compelled, against their will, and have not, nor hath any or either of them, at any time or times whatsoever hitherto, been used or accustomed to be compelled to answer any plea or plaint in any action personal (pleas of freehold, felony, and appeals only excepted) before any justice or minister of our said lady the Queen, or other judge whomsoever, in any court whatsoever, except before the justices of our said lady

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the Queen herself at *Westminster* aforesaid. And the defendant further saith, that at the commencement of this action he was not, nor hath he ever been, an attorney, officer, or minister of the said court of our lady the Queen before her justices at *Westminster*. And this the defendant is ready to verify; wherefore he prays judgment if the said court of our lady the Queen before her justices at *Westminster*, will or ought to take cognisance of the said plea."

Demurrer: assigning for causes—that being a plea to the jurisdiction of the court, it was pleaded by the defendant by his attorney, and not by the defendant in his own proper person; that it was defective, uncertain, and unprecise in this, to wit, that although it was therein alleged and averred that the defendant, at the commencement of the action was not, nor hath ever been, an attorney, officer, or minister of this court, yet it is not alleged or shewn, in or by the said plea, that the defendant was not, at the time when the said plea was actually pleaded, such attorney, officer, or minister; and that the plea is further defective, unprecise, and insufficient in this, to wit, that although it states that the defendant was not, at the commencement of the action, nor had ever been, an attorney, officer, or minister of this court, yet it does not go on to say that the defendant had not, at any time since the passing of a certain act of parliament made in the first year of the reign &c., intituled &c. (7 *W.* 4. and 1 *Vict. c.* 56.), practised in this court.

Joinder in demurrer.

Channell Serjt. in support of the demurrer. This is, in substance, a plea to the jurisdiction, which should have been pleaded in person, and cannot be pleaded after the appointment of an attorney. Pleas of privilege are classed by *Comyns* among pleas to the jurisdiction:

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Com. Dig. Abatement, (D. 6.), *Ibid.* (I. 17.) In *Chatland* v. *Thorneley* (*a*), where the defendant pleaded that he was an attorney of the court of King's Bench, and not suable by bill, the defendant pleaded in person (*b*); and in *Gilbert C. P.* 187., it is said, that this plea cannot be pleaded except in person. In *Grant* v. *Lord Sondes* (*c*), *De Grey* C. J. says, that the defendant cannot, after appearing by attorney, plead in person to the jurisdiction. [*Tindal* C. J. He comes into court to apply to be admitted to defend by attorney, which admits the jurisdiction.] That is the ground of the opinion expressed in *Grant* v. *Lord Sondes*. In *Com. Dig. Abatement*, (D. 9.) it is said, that a writ of privilege shall not be allowed to an attorney, &c., who claims privilege of suit in another court, after plea, by which he allows the jurisdiction of the court where the action is brought (*d*); and in *Com. Dig. Abatement*, (I. 17.) it is said, that after an attorney made, the defendant shall not plead misnomer of himself. (*e*) [*Maule* J. The question raised by the demurrer is, whether the plea is good or not. We are not now discussing whether the circumstance of the defendant having appeared by attorney would or would not have been a ground for applying to the court to set aside the plea.] It is submitted that the plaintiff may either apply to the court to set the plea aside, or demur to it, at his election; *Godefroy*

(*a*) 12 *East*, 544.

(*b*) In that case the plea was clearly not to the *jurisdiction*, the objection taken being merely that the defendant being an attorney of the court, ought not to have been sued as *in custodiâ marescballi*, but *in the same court* as an officer.

(*c*) 2 *W. Bla.* 1094.

(*d*) In the case in Sir *F. Moore*, 34., pl. 111., there cited, the defendant sued out a writ of privilege after issue joined.

(*e*) Because, by appointing an attorney in the name by which he is sued, the defendant is estopped from saying that it is not his name; *M.* 3 *H.* 6, fo. 16, pl. 22. And, *e contrà*, after pleading in abatement, he cannot appoint an attorney; *M.* 41 *E.* 3., *Fitz. Abr. Attorney*, pl. 50., *H.* 45 *E.* 3., *Fitz. Abr. Attorney*, pl. 52., *F. N. B.* 27 A.

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v. *Jay*. (*a*) Secondly, the plea ought to have directly alleged that the defendant was not an attorney of this court at the time of plea pleaded. The statement, that he was not at the commencement of this action, nor hath he ever been an attorney, officer, or minister of this court, is not sufficiently precise.

Stephen Serjt. *contrà*. By demurring the plaintiff admits that the parties are properly before the court. The only mode of taking advantage of the alleged informality, would have been by motion to set aside the plea. The case of *Grant* v. *Lord Sondes*, at first sight, appears to be an authority to shew that the objection is well founded, and that it is one which may be taken upon demurrer; but nothing was decided in that case, except that the plea, which was after imparlance, was bad. By imparling, the defendant clearly recognises the jurisdiction. He prays and obtains, leave of the court to negotiate with the plaintiff in the very suit so brought in that court. After this the defendant could not be heard to say that the step which he had taken was idle, and *coram non judice*. In *Grant* v. *Lord Sondes*, all that is applicable to this case, is merely an extra-judicial opinion of the Lord Chief Justice. In *Gilbert's Common Pleas*, 187. (*b*) &c., pleas to the jurisdiction, properly so called, that is, in cases where the court has not cognisance of that which forms the subject-matter of the cause, are carefully distinguished from pleas of exemption by reason of privilege. Of the first class, but not of the second, it is said that "the defendant must plead it *in propriâ personâ*; for he cannot plead by attorney without leave of the court first had, which acknowledges their jurisdiction (*c*); for the attorney is an officer of

(*a*) 6 *Bingh*. 616.

(*b*) P. 151. 1st ed.

(*c*) At common law a defendant could not *appear* by attorney without a special authority from the crown in the form of a writ of *dedimus potestatem de attornato faciendo*, though after appearance he might be admitted by the court

the court, and if they put in a plea by the officer of the court, that plea must be supposed to be put in by *leave* of the court." In *Cremer* v. *Wicket* (*a*), misnomer of the defendant being pleaded by attorney the plaintiff demurred; but it was held, by Lord *Holt*, to be good cause to *refuse the plea*, but not to *demur*. *Rex* v. *Westby*. (*b*) [*Maule* J. It would be no ground of demurrer that a defendant pleaded infancy by attorney.] Yet that would be error in fact. (*c*) In 2 *Wms. Saund.* 2. *b.* and 309. *b.*, instances are given of pleas to the jurisdiction pleaded by attorney, from *Rastall's Entries*, 472. (*d*), and *Clift's Entries*, 17. (*e*) But this is not a

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to *defend* by attorney. But by statute *Westm.* 2. (13 *Edw.* 1.) *c.* 10. all persons impleaded may make an attorney to sue for them in all pleas moved by or against them, in the superior courts there enumerated. Various acts of parliament have given the courts authority in selecting the persons who may be appointed attorneys; but to appear and defend by attorney, seems to be a general statutory right under *Westm.* 2.

(*a*) 1 *Ld. Raym.* 509.

(*b*) 10 *East*, 85. n.

(*c*) It is conceived that errors in fact apparent on the record would be ground of demurrer, and that for such errors the judgment would be *reversible* in a superior court rather than *revocable* in the court which had committed the mistake. When the facts which render the judgment erroneous are not apparent on the record, a writ of error *coram vobis* to revoke the judgment is necessary. Thus the non-joinder, as defendant, of a joint-character, is, ordinarily, the subject of a plea in abatement; but if it appears by the declaration that the party omitted to be sued was a joint contractor, and that he is living and within the jurisdiction, a demurrer in abatement would appear to be the proper course. The true reason why a plea of infancy by attorney cannot be demurred to, will perhaps be found to be this—that the substance of the plea is, that the defendant was an infant at the time the contract was made, or the alleged cause of action accrued. The allegation that the defendant *continues* to be an infant is nugatory; it is neither material nor traversable. All therefore that the demurrer would admit, is, that the defendant, who now appears by attorney, was at some undefined by-gone time, an infant, an admission of little value.

(*d*) There, the replication, after stating by way of inducement, that the defendant was a papal notary under the cardinal (*Warham*), archbishop of *Canterbury*, traversed the allegation that the defendant was servant to a clerk in chancery.

(*e*) *Vide post*, 188.

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plea to the jurisdiction, but a plea of privilege; and not being a plea to the jurisdiction, it might have been pleaded after a general imparlance; *Clapham* v. *Lenthall.* (*a*) This plea is in the form adopted in *Lewis* v. *Kerr.* (*b*)

It was unnecessary to allege that the defendant was not an attorney of the court at the time of pleading; *Percival* v. *Cooke.* (*c*)

Channell Serjt., in reply. This is a plea to the jurisdiction, though founded upon the privilege of the defendant. The object of *Gilbert* C. B., in the passages which have been cited, was, simply, to point out the different species of imparlances, of which he enumerates three. Citing 22 *H.* 6. 71. (*d*), he says (*e*), "There was a special imparlance, &c., viz. salvis omnibus allegationibus et exceptionibus omnimodis, tam ad breve quam ad narrationem; and the court would not allow the defendant privilege, because, says the book, by imparling, he had admitted the jurisdiction of the court. But the true reason of that resolution seems to be, that, by this imparlance, he has confined himself to take advantage only of the defect in the writ and count; but had he obtained from the court a general special imparlance, viz. *salvis omnibus et omnimodis advantagiis et exceptionibus*, he might then have pleaded his privilege; for that is not to oust the court of their jurisdiction, but is a privilege which each court allows to the officers of the other to be sued in their own court only (*g*); and the modern authorities are express, that privilege may be pleaded after a general special imparlance." The party comes and expressly reserves to himself

(*a*) *Hardres*, 365.
(*b*) 2 *M.* & *W.* 226.
(*c*) 5 *M.* & *W.* 293.
(*d*) It should be fo. 7; the case is *M.* 22 *H.* 6, fo. 7, pl. 9.
(*e*) 170.
(*g*) *Vide post*, 187. (*g*).

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all advantages and exceptions, and then comes in and avails himself of that reservation. Again, *Gilbert* says, p. 149. (*a*), "Thirdly, what may be pleaded after special imparlance. All pleas in abatement, unless to the jurisdiction and privilege after special imparlance. Privilege can only be pleaded after a general imparlance; because it is neither an objection to the writ, bill, or count. 1 *Sid.* 29 (*b*), 2 *Ro. Rep.* 244. (*c*), seem to be contrary, and that privilege cannot be pleaded after an imparlance. It is not said, in either of the cases, that it was a special or a general imparlance; and the latest resolution, viz. *Hardres* (*d*) and *Lutwyche* (*e*), are express in point, that it may be pleaded after a special imparlance; for it does not oust them of their jurisdiction, but is a privilege which each court allows (*g*) the officers of another to be sued in their court." *Wentworth* v. *Squib*, the case in *Lutwyche* referred to by *Gilbert*, was

(*a*) First edition.

(*b*) *Barnes* v. *Lord Ward* in K.B. There, to an action on the case the defendant pleaded, after an imparlance, that he was a peer of parliament, and ought not to be impleaded during the session of parliament, and shewed the letters patent in his plea, *ut oportet*; and it was held that he could not plead such a plea after imparlance. *Nota.* It was said that if one be made a peer of parliament by writ, then he must shew his writ of summons and pray his privilege, and not plead in abatement of the writ, as he has done here; and it was also said that the privilege of a member of parliament not to be sued, holds only for *twenty* days, before and after the parliament; as appears by the parliament roll, as the chief justice (Sir *Robert Foster*) said, although they *claim* to have it for *forty* days before and after; which they ought not to have. *Vide antè*, vol. ii. p. 437. 453. n. (*a*), (*b*).

(*c*) *Whicksley's* case, *ut videtur*, which seems to be little to the purpose.

(*d*) *Clapham* v. *Lenthall*, *Hardres*, 365.

(*e*) *Wentworth* v. *Squib*, 1 *Lutw.* 43. 46.

(*g*) It appears rather to be a right inherent in the court, of which the party is an officer, to prevent its own proceedings from being interrupted or delayed. *Vide Cawthorne* v. *Campbell*, 1 *Anstr.* 229., *antè*, vol. ii. p. 457. Formerly the court in which the officer was impleaded was apprised of the right claimed, by the writ of privilege which accompanied the pleas; see *Rastall*, 472., &c.

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an action of debt on bond; to which the defendan pleaded his privilege, as an officer of the Exchequer (*a*) in person. *Channell* then referred to *Com. Dig. Abatemen* (D. 6.), (D. 9.), (D. 17.), and the cases there cited. I the first case of pleas of privilege in *Rastall* (*b*), the de fendant pleads by attorney, but the four following plea are pleaded in person. (*c*) In the case in *Clift's Entrie* the plea by attorney was strictly to the jurisdiction. I stated that the cause of action had arisen upon the high seas within the jurisdiction of the admiralty, and out o the jurisdiction of this court. The plaintiff, in his re plication, took issue upon the allegation. Nothing turne upon the form of the appearance. *Grant* v. *Lord Sonde* is a distinct authority, that the objection may be take upon demurrer.

TINDAL C. J. It is unnecessary to decide whethe the alleged informality can be taken advantage of o demurrer, because we think that the plea is good. I appears to us that the plea is a plea of privilege, and no to the jurisdiction. The distinction is clearly drawn b *Gilbert* in his *History and Practice of the Court of Com mon Pleas*, p. 187. (*d*), where it is said that pleas i abatement are threefold: first, to the jurisdiction the court; secondly, to the person, first of the plaintif secondly of the defendant; thirdly, to the writ, an therein, first, to the form, secondly, to the action.

He goes on to say, p. 191. (*e*), "There are no ple to the jurisdiction of the courts at *Westminster* in tran itory actions, unless the plaintiff, by his declaratio shews that the cause of action accrues within the coun palatine, or if it be (not) between the scholars of *Oxfo*

(*a*) Clerk of the *Nihils*.

(*b*) 472., &c.

(*c*) As it was not contended that the defendant was *bound* to plead by attorney, the circumstance of the entries being both ways, was in favour the defendant, according whom both courses were op to him.

(*d*) P. 151. 1st ed.

(*e*) P. 158. 1st ed.

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and *Cambridge*." Therefore, unless the want of jurisdiction is shewn on the face of the record, it does not appear that it can be pleaded; but the matter must be evidenced by some superior court claiming jurisdiction. (*a*) That passage does not apply to the present case; but if we turn to p. 209. (*b*), we come to the second division of pleas in abatement. First; to the person of the plaintiff; then to the person of the defendant (*c*); under which head he says (*d*), "The particular privilege which the officers in each court enjoy, is, not to be drawn out of their own court, to be impleaded elsewhere; for as their attendance is constantly necessary to despatch the business of the court to which they belong, their causes might suffer, because they could not be spared from their own court to defend them. (*e*) Whenever, therefore, he is impleaded out of his own court, he shall say that he is attorney, &c., of another court, and conclude with unde ne intendit quo (quod) cur. &c., hic, placitum prædictum versus eum cognoscere velit et debeat, &c." The question here is, whether a plea of privilege by an attorney must *necessarily* be pleaded in person. The precedents in *Rastall* and *Thompson* are both ways. (*g*) It would, therefore, seem that this is not a fatal objection. The expressions used by *De Grey* C. J. in *Grant* v. *Lord Sondes*, are, indirectly, an authority against this plea: but we have a direct authority, in *Higgs* v. *Harrison* (*h*), that this privilege may be pleaded by attorney. In that case, the court having taken time to consider, *Rolle* C. J. said — "that the opinion of the court was, that an attorney may plead his privilege by attorney, and there no inconvenience follows by doing it. But it is true the precedents are both ways; and it is not contrary to any thing he hath done; and it may be he is

(*a*) *Tidd*, 631., 9th ed.
(*b*) P. 158. 1st ed.
(*c*) P. 167. 1st ed.
(*d*) Pp. 168, 169. 1st ed.
(*e*) *Vide antè*, Vol. ii. p. 470. (*a*).
(*g*) *Antè*, 188. (*c*)
(*h*) *Style's Rep.* 413.

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sick, or hath business in another court, where he is necessarily to attend. Therefore let his plea be allowed nisi."

COLTMAN C. J. I am of the same opinion. In *Com. Dig.* pleas of privilege are certainly treated as pleas to the jurisdiction. But, according to *Gilbert*, such pleas are not properly pleas to the jurisdiction. *Clapham* v. *Lenthall* (*a*) and *Higgs* v. *Harrison* (*b*) are to the same effect. The *dictum* of *De Grey* C. J. in *Grant* v. *Lord Sondes* was not a judicial decision upon the question. The *decision* in that case was, simply, that general imparlance would not be allowed for the purpose of ousting the court of jurisdiction; whereas the case in *Style* is directly in point, and was decided after time taken to consider, and upon reasons which appear to me to be sufficient.

ERSKINE J. I am of the same opinion. Upon principle, and also upon authority, I think that an attorney should be allowed to plead his privilege by attorney. The reason for allowing the privilege is thus stated by *Gilbert*, — "that their attendance is constantly required to despatch the business of the court to which they belong." The court of Queen's Bench was, in its origin, ambulatory. That being the foundation of the privilege (*c*), it seems absurd to say that an attorney must plead his privilege in person; for by coming in person he might formerly have been drawn from one end of the kingdom to another. If the precedents had been all one way, we should have been bound by them, although we could not have seen the reason of the rule.

MAULE J. concurred.

Judgment for the defendant.

(*a*) *Hardres*, 365.
(*b*) *Style's Rep.* 413.
(*c*) *Vide Gilb. C. P.* 171.

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ASSUMPSIT, for work and labour, money paid, and interest, and upon an account stated.

Plea: non assumpsit; on which issue was joined.

At the trial before *Tindal* C. J., at the sittings in *London* after *Hilary* term last, it appeared that the action was brought to recover from the defendant, as a shareholder in the *Minas Geraës Mining Company*, a balance of 489*l.* 19*s.* 3*d.*, which the plaintiff, after giving credit for 300*l.* received, claimed to be due to him for services rendered to the company, as a miner or mine officer. The company had been projected at the commencement of the year 1836, and on the 2d of *April* a prospectus was issued, stating the company to be formed for the purpose of working certain gold mines in *Brazil*, and that "the capital is to be 100,000*l.*, in 5000 shares of 20*l.* each; of this sum it is not probable

The prospectus of a joint-stock company, established for the working of mines in the *Brazils*, stated that the capital was to consist of 100,000*l.* in 5000 shares of 20*l.*, 3*l.* per share to be paid on the apportionment of the shares. Only 4225 shares being subscribed for, some of the directors took the remaining shares, but one or two never paid the deposit thereon, having merely given their promissory notes for the amount, which notes were not taken up. In their first annual report, the directors, however, stated that the whole of the shares had been appropriated, and the deposit thereon paid. The defendant was a shareholder, who had paid the deposit on his shares, and two additional calls, and had called several times at the office of the company to ask for information as to the affairs of the company, and had attended a meeting of the shareholders.

Held, that as the defendant had the knowledge, or the means of knowledge, of the proceedings of the directors, the jury were justified in coming to the conclusion that he had sanctioned their acts, and, in considering him liable in respect of a contract entered into by them with reference to the working of the mines.

It appeared that *A.* had entered into an agreement with *B.* for the purchase of certain mines in the *Brazils*, and that *A.* had assigned over his interest in the mines, under such contract, to the company. It was stated by a witness that mines in the *Brasils* were usually transferred, by an instrument in writing *by deed*.

Held, that the transfer *in writing* was evidence from which it might be assumed that the mines were duly conveyed; no proof having been given that, by the *Brazilian* law, a deed *under seal* was required.

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that more than 10*l.* per share will be required, which i to be paid as follows: — 3*l.* per share to Messrs. *Ba clay*, *Bevan* and *Tritton* on the apportionment of th shares; 3*l.* in four months, 2*l.* in eight months, and 2 in twelve months, from that date."

On the 7th of *April* the defendant wrote to the dire tors, requesting that 150 shares might be appropriate to him; and on their being allotted, paid the depos thereon of 3*l.* per share; and also, having in the mea time disposed of 100 of his shares, paid two subsequer calls of 3*l.* each on the remaining 50 shares; the la call being paid on the 26th of *December* 1839. A fourt call had been made in *April* 1840 of 1*l.* per shar which the defendant had not paid. The secretary an clerk of the company proved that the defendant ha called several times at the office to inquire as to th progress of the company, and that, the mines havin ceased to be worked in the preceding *October*, he wa present at a meeting of the shareholders in *Decembe* 1839.

It also appeared that, 4225 shares only having bee subscribed for, three of the directors agreed to divid the remaining unappropriated shares among themselve in addition to the shares which they had originall taken. On these additional shares, two out of thes three directors never paid the deposit, having give their promissory notes for the amount, which still re mained due. The directors, however, in their firs annual report laid before the shareholders in *June* 183 had represented that the entire capital had been sub scribed, and the deposit thereon paid. No deed c partnership had ever been signed by the shareholders.

It further appeared that the company had been origi nated by one *Hocheder*, who, on the 1st of *April* 1836 entered into an agreement with a Dr. *Cliffe* for th purchase of certain mines in the *Brazils*, for 35,000*l*

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ledge (*a*), of the proceedings of the company, had authorized the directors to act as his agents generally in respect of the affairs of the company; for if so, the engagement of the plaintiff would lie within the scope of their authority. The jury having found in the affirmative, a verdict was taken for the plaintiff for 489*l.* 19*s.* 3*d.*, leave being reserved to the defendant to move to enter a nonsuit.

Channell Serjt. in *Hilary* term last having obtained a rule nisi accordingly,

Wilde Solicitor-General (with whom was *Warren*) now shewed cause. It is clear that a mining company is, for most purposes, a trading concern. See *Collyer on Partnership*, and cases there cited, 657—665. *Per Parke* B. *Tredwen* v. *Bourne*. (*b*) The case of *Vice* v. *Lady Anson* did not undergo much consideration; and, at any rate, it is distinguishable from the present. The ground of the decision in *Dickinson* v. *Valpy* was, that no actual partnership had been formed; here, the whole number of shares were appropriated, and the deposit on most of them paid. The circumstance that the deposit on some of the shares was not paid can make no difference; at least so far as third parties, like the plaintiff, are concerned; for even supposing the conditions of the partnership were not strictly performed, that cannot affect the question of the liability of the shareholders to the world at large. In *Pitchford* v. *Davis* a small portion only of the intended capital was raised, no more than 1400 out of 10,000 shares having been taken. There, Lord *Abinger* C. B. told the jury that without evidence that the defendant knew of and assented to the works being carried on with a smaller capital than

(*a*) *Vide post*, 199. *n.* (*b*) 6 *M. & W.* 461.

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was originally proposed, he would not be bound by the contract of the directors, and that it was for the jury to say whether the works were so carried on with his knowledge and consent; and the jury having found for the defendant, the court refused to disturb the verdict. It must be taken that there the jury came to the conclusion that the works had been carried on *without* the defendant's knowledge or consent; whereas, in the present case, the jury expressly found that the defendant had authorized the acts of the directors, with knowledge, or the means of knowledge, of all their proceedings. *Tredwen* v. *Bourne* (*a*) is a direct authority for the plaintiff. There, a mining company was formed, the capital to be 30,000*l.* in 3000 shares of 10*l.* each. 2000 shares only were actually subscribed for, of which the defendant took 100; and it was held that letters subsequently written by the defendant to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to shew that he authorized the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines on the order of the directors. It is said there by *Parke* B., "The sole question was, whether there was evidence to go to the jury that the defendant gave authority to the directors to pledge his credit to the plaintiff. If the case had stood merely on the fact of his being a shareholder, I should have thought it was not sufficient. But his letters, which were put in, shewed, first, that he knew the directors were acting in the management of the partnership; and, secondly, that he was taking a personal interest in the concern; and they were evidence for the jury that he authorized the directors to

(*a*) 6 *M. & W.* 461.

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do what they did, for his benefit. It is said that he was deceived as to the amount of capital; but whether he knew the amount actually subscribed or not, there was proof that he authorized the directors to proceed in the management of the concern. Either he knew it, or not knowing it, chose to authorize the directors to proceed." This is a stronger case than *Tredwen* v. *Bourne*. Here, the company was carried on for three years. The defendant not only paid the deposit on his shares, but actually paid a third call in *December* 1839, after the mines had ceased to be worked. He was in the habit of calling at the company's office for information as to its affairs, and attended a meeting of the shareholders convened for the purpose of winding up its concerns. It cannot, therefore, be doubted that he had the means of knowing, if not the actual knowledge of what the directors were doing, and that he sanctioned every thing they did in furtherance of the objects for which the company was formed.

Channell Serjt. (with whom was *Hoggins*) in support of the rule. It is submitted that the defendant was not liable for the acts of the directors. In order to render him responsible upon a contract by them, it is essentially necessary that the partnership should be completely formed; *Dickinson* v. *Valpy*; or, at any rate, it should be shewn that the defendant, with knowledge that the capital had not been subscribed, or that the other conditions on which the partnership had been proposed to be entered into had not been complied with, had authorized the directors, either expressly or impliedly, to carry on the concern; *Pitchford* v. *Davis*; *Tredwen* v. *Bourne*. Here, it was a condition of the company being formed, that the whole of the shares should be subscribed, and the deposit paid; and the first report of the directors was framed so as to mislead the share-

holders, and induce them to believe that the deposit had been paid upon all the shares. It is said that the defendant had knowledge, or the means of knowledge, of the proceedings of the directors, and sanctioned what they did. There was no proof that he had any actual knowledge of the irregularities of which the directors had been guilty; and, with respect to the means of knowledge, it is not to be expected that a shareholder should himself examine the books of the company to ascertain whether the representations of the directors are correct; and it is by no means certain, if the defendant had wished to do so, that he would have been permitted: and even if he had been allowed to examine the accounts, they were so drawn up as to conceal from him the real facts as to the payment of the deposit.

There was no sufficient evidence that the company had any interest in any mines whatever; and undoubtedly there was no proof that they had any legal interest in the mines professed to be conveyed to them by *Hocheder*; for it was stated by one of the plaintiff's witnesses, that mines in the *Brazils* are transferred *by deed*. In *Vice* v. *Lady Anson*, although the defendant had at one time held herself out as a partner, it was decided that she was not liable, on the ground that no assignment had been made to her of any interest in the mine. [*Tindal* C. J. The rule for a new trial in that case was refused; and consequently the subject did not undergo much discussion.]

TINDAL C. J. The question is, whether the defendant is liable as a partner in this mining company. It seems to me that the first objection made, namely, that there was no proper conveyance of the mines to the company, is answered by the fact that there was a transfer of them in writing; and no evidence was given to shew that such transfer was insufficient; for it was

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not proved that, by the *Brazilian* law, a deed is required to be under seal. I am not inclined to find fault with the decision of the jury upon the question which was submitted to them. I think they came to a right conclusion. It may be, that the first report of the directors was calculated to mislead the shareholders; but the defendant might, if he had thought proper, have referred to the company's books, and have ascertained whether the representations in the report were correct. If he had not actual knowledge of the real state of the company's affairs, he undoubtedly had the means of knowledge; and it appears to me that there is no ground for disturbing the verdict.

COLTMAN J. I do not think that the case of *Vice* v. *Lady Anson* is to be understood as laying down the proposition, that before a party can be charged as a partner in an undertaking like the present, strict legal proof must be given of a conveyance of the mines to the company. With respect to the condition upon which it is alleged, this company was proposed to be formed, the non-performance of such condition affords no ground as regards third parties, for exempting the defendant from liability to the engagements of the company. It was competent to the shareholders to waive it; and the jury have, in effect, by their verdict, found that the defendant had done so. If he was not aware of the actual state of the concern, he undoubtedly had the means of knowledge if he had chosen to avail himself of them.

ERSKINE J. was at nisi prius.

MAULE J. I also am of opinion that this rule must be discharged. If *Vice* v. *Lady Anson* is to be considered as deciding that a shareholder cannot be held

liable for the debts of the undertaking, unless he is proved to have a legal interest in the mine, the decision clearly could not be supported. But no such construction can be put upon the case when fairly examined. It was there sought to charge the defendant upon the ground that she was an owner of the mines; and no proof of ownership was established. Here, there was some evidence of a legal transfer of the mines. In speaking of a *deed* executed in a foreign country, we do not necessarily mean an instrument under seal. In many countries seals are unknown. With respect to the second point, — that the company was formed on a condition that all the shares should be subscribed, and that a deception was practised by the directors on the shareholders in their first report, — if the defendant had made inquiry, and had ascertained that the whole capital had not been subscribed in accordance with the terms of the prospectus, he might possibly have been at liberty to retire from the partnership. There are few companies in which the promises held out by the prospectus are realised. It seems to me that there was abundant evidence to justify the jury in coming to the conclusion, that the defendant had assented to the directors carrying on the affairs of the company, and had sanctioned their proceedings.

Rule discharged. (*a*)

(*a*) And see *Lucas* v. *Beach*, *antè*, Vol. I. 417. See *Hawken* v. *Bourne*, 8 *M.* & *W.* 703.; and as to the effect of the possession of the *means of knowledge*, see *Kelly* v. *Solari*, 9 *M.* & *W.* 54.; *Bell* v. *Gardener*, *post*, Vol. IV. 11.

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June 11.

CURTIS *v.* RICKARDS.

The court has no power, under the provisions of the 48 *G.* 3. *c.* 123. *s.* 1., to discharge a prisoner, who is in custody upon a judgment exceeding 20*l.*, although it is shewn by affidavit that, previously to the commencement of the action, the debt had been reduced below 20*l.*

TALFOURD Serjt. moved for the defendant's discharge under the provisions of the 48 *G.* 3. *c.* 123. *s.* 1. It appeared that a verdict had been taken against the defendant for 20*l.* 5*s.*, for which judgment had been entered up; and the affidavits on which the application was founded, stated that previously to the bringing of the action, payments had been made by the defendant on account of the debt, which had reduced it below 20*l.*, but which had not been allowed in signing judgment. [*Maule* J. Why were not those payments shewn at the trial?]

TINDAL C. J. We have no power to discharge the defendant. The case is not within the act; which applies only to persons in execution on a *judgment* "for any debt or damages not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment."

Motion refused.

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Ex parte WHITTY and Another.

June 12.

TALFOURD Serjt. moved for leave to amend the certificates of the acknowledgments of two married women, taken pursuant to the 3 & 4 *W.* 4. *c.* 74. The certificates purported to be of acknowledgments by them of the execution of deeds of lease and release, whereas they were parties only to the release. [*Tindal* C. J. How can we order any amendment after the fact is sworn to and certified?] This case is, in some degree, analogous to *Lloyd and Another, demandants, Nicholas, deforciant* (*a*), and *Evans, demandant, Davies and Wife, deforciants* (*b*), where the court ordered amendments to be made on the roll of proclamations of fines levied in the court of Great Sessions in *Wales*.

The certificates of the acknowledgment of two married women under the 3 & 4 *W.* 4. *c.* 74., stated them to have executed deeds of lease and release; whereas they were parties only to the release. The court refused to amend the certificates.

TINDAL C. J. The cases cited are not applicable; for there the defects arose from the neglect of the officer of the court. Were we to make the amendment sought for, the affidavits would be falsified.

Motion refused.

(*a*) 4 *New Cases*, 633. (*b*) 5 *New Cases*, 229.

June 2. RIDER, Assignee of C. J. TASKER, Esquire Sheriff of the County of the City of GLOUCESTER *v.* EDWARDS.

A declaration on a replevin bond against the distrainee alleged that the distrainee did not appear at the county court holden next after the making of the bond, and then and there prosecute her suit with effect against the distrainors.

A plea that the distrainors entered their appearance at the next county court, and that the said suit from thence hitherto has been and still is pending and undetermined, is bad, as not shewing that the distrainee appeared at the county court, or was discharged from so appearing.

DEBT, by the assignee of a replevin bond for 400 against the principal obligor.

The declaration stated that on the 24th of *July* 184(the plaintiff *Rider* and one *A. Bretherton* distrained cer tain goods of *Edwards* for rent then claimed to be du to the now plaintiff; and that the goods being so dis trained, *Edwards* afterwards, to wit, on the said 24th (*July* 1840, made his plaint to *Tasker*, then being sheri of &c., out of the county court of the said sheriff, of th taking and unjustly detaining of the said goods by th said *Rider* and *Bretherton*, and then prayed the sai sheriff that the said goods might be forthwith replevie by the said sheriff and delivered to *Edwards;* and there upon *Tasker* so being sheriff of &c., according to th form of the statute in such case made and provided, di take from *Edwards*, and one *Johnson* and one *Brown*, a two responsible sureties, a bond, in double the value (the goods so distrained as aforesaid, the value of th said goods having been, on that occasion, first ascer tained by the oath of a credible witness duly sworn ac cording to the form of the said statute; and that *Edward* and the said *Johnson* and *Brown* on the said 24th (*July* 1840, by their certain writing obligatory seale with their respective seals, became jointly and severall held and firmly bound unto *Tasker*, so being sheriff (&c. in the sum of 400*l.* above demanded, to be paid t the said sheriff; with a condition thereunder writter that if *Edwards* appeared at the then next county cour to be holden at the shire-hall in *Gloucester*, in and fo

the county of the city of *Gloucester* aforesaid, and then and there prosecuted his suit with effect against *Rider* and *Bretherton*, for taking and unjustly detaining certain goods in the said condition mentioned, and did and should also make return thereof, if return thereof should be adjudged by law, and also did and should effectually save and keep harmless and indemnify *Tasker*, his undersheriff, &c., for, touching, and concerning the replevying and delivery of the said goods, and also of, from, and against all actions, &c., then the said writing obligatory was to be void and of none effect, otherwise to be and remain in full force. That thereupon the sheriff afterwards, to wit, on &c., at the prayer of *Edwards*, replevied and made deliverance of the said goods to *Edwards*, according to the duty of his said office; and although afterwards, to wit, on the 4th of *August* 1840, the county court of the said sheriff of &c. was duly holden at &c. before &c., then suitors of the said court, the same being the next county court of the said county of the city of *Gloucester*, after the making of the said writing obligatory, yet *Edwards* did not appear at the said county court, so holden next after the making of the said writing obligatory as aforesaid, and then and there prosecute his suit with effect against *Rider* and *Bretherton*, according to the form and effect of the said condition, but wholly omitted and neglected so to do; whereby the said writing obligatory became forfeited to *Tasker*, so being sheriff of &c. as aforesaid. Averment: that the said writing obligatory being so forfeited, the said sheriff afterwards, and before the commencement of this suit, to wit, on &c. assigned the same to *Rider*. By means whereof, and by force of the statute in such case made and provided, an action accrued to *Rider* as assignee of *Tasker*, so being sheriff of &c. to demand and have of and from the now defendant, the sum of 400*l*. above demanded. Profert of the bond.

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Plea, *inter alia*, that after the said sheriff had take from *Edwards*, *Johnson*, and *Brown* the said writin obligatory, with the said condition, in manner an form as in the declaration mentioned, to wit, at th county court of the said sheriff holden next after th making of the said last-mentioned writing obligatory, t wit, on the said 4th of *August* 1840, *Rider* and *Bretherto* by their attorney in that behalf, to wit, one *J. B.*, ac cording to the practice of the said court, entered thei appearance in the said court to the said plaint of th defendant in the declaration mentioned, and that th said suit from thence hitherto had been and still wa depending and undetermined. Verification.

Special demurrer, assigning for causes—that the breac of the condition by the defendant in not appearing a the county court holden next after the making of th said writing obligatory, was not denied, nor was th same in any way excused; that the plea was pleaded t the whole action, but was an answer, if at all, to part o the breach only, namely, as far as the same related t the prosecuting of the suit with effect; that if, by th plea, it was meant to make it appear that the plainti did appear, the same was argumentative, and uncertain and inferential only, and that it ought distinctly to hav alleged that the defendant did appear at the said count court; that it ought to have shewn in what way th suit was pending, or how the plaintiff had brought th same into the county court, or how the same wa entered or brought into the county court, and whethe the same was entered in the court books of the count court, or otherwise became pending there; that th entry of the appearance by *Rider* and *Bretherton* was no alone, sufficient to bring the suit into the county cour or to make the same pending there, without the ap pearance there of *Edwards*, or the entry there of th plaint; that the plea did not shew in what way th

entry of the appearance by *Rider* and *Bretherton* was equivalent to the appearance of *Edwards* at the county court; nor did it appear by the plea, that such appearance of *Rider* and *Bretherton*, or the entry thereof, rendered the appearance of *Edwards*, according to the terms of the condition, unnecessary for the purposes of the suit, or at all dispensed with the same, or in what manner the same was dispensed with by the entry of the appearance of *Rider* and *Bretherton*, whether according to the practice of the county court, or in any other manner; that it did not appear that the entry of the appearance of *Rider* and *Bretherton* would, by the practice of the county court, or by any means whatever, have enabled them or either of them to force on the suit, or to compel *Edwards* to proceed with the same; that it was uncertain whether the plea was intended to be relied on as shewing a performance of the condition, for the breach whereof *Rider* had declared, or as shewing a waiver or discharge by *Rider* of such performance; that if *Edwards* meant to rely on a waiver or discharge by *Rider* of the condition, or of so much of the condition as related to the appearance of *Edwards* at the next county court, he ought to have pleaded such waiver or discharge accordingly, or, at all events, if the entry of appearance by *Rider* and *Bretherton* was meant to be relied on as such waiver or discharge, by them or either of them, of so much of the condition as related to the appearance of *Edwards* at the next county court, then the plea ought to have stated it to have been such waiver or discharge, and the manner in which it operated as such waiver or discharge ought to have been pointed out; that if the plea was intended to be relied on as shewing a performance by *Edwards* of the condition, it should have been so distinctly pleaded, and should have concluded to the country; that the

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plea contained matter of evidence only; and if th matter therein contained was relied on as an admis sion by *Rider*, that *Edwards* did appear accordin to the condition, the same should have been pleade by way of estoppel, and not as matter in confessio and avoidance.

Channell Serjt. (with whom was *Peacock*) in suppo of the demurrer. By the condition of the bond, *Ed wards*, the distrainee, and now defendant, was bound t appear and prosecute the suit with effect. The decla ation alleges a breach in *Edwards* not appearing an prosecuting with effect. That breach is not traversed and if the plea could be considered as amounting t such a traverse, it should have concluded to the countr Neither is the breach avoided; for the allegation of th appearance of the distrainee, is an allegation of collateral fact, necessary indeed for the purpose of en abling *Rider* to obtain an assignment of the replevi bond; *Seal* v. *Phillips* (*a*); but wholly immaterial wit reference to the performance of the condition of th bond.

Bompas Serjt. in support of the plea. The 11 *G.* c. 19. *s.* 23. requires the distrainee to enter into a bon conditioned for appearing at the next county court an prosecuting the suit with effect and without delay. Th condition of the bond into which *Edwards* has entere is, to appear at the next county court, and then an there (*b*) to prosecute his suit with effect. This con dition, construed as it must be, by the language of th statute, imports that the distrainee shall prosecute hi

(*a*) 3 *Price*, 17.

(*b*) The introducing of these words into the condition of the replevin bond, does not seem to be warranted by the statute. *Vi Jackson* v. *Hanson*, 8 *M.* & *W* 477. 487.

action of replevin to a successful termination; *Duke of Ormond* v. *Bierley* (*a*); *Brackenbury* v. *Pell.* (*b*)

If the distrainor appears in the county court, an appearance by the distrainee, who has already levied his plaint in that court, is immaterial. 2 *Inst.* 139. (*c*), *Impey's Sheriff*, 192. [*Tindal* C. J. That part of the condition which requires the distrainee to prosecute his suit *with effect*, appears to be broken by not using due diligence in prosecuting his suit, although the suit is still undetermined; *Harrison* v. *Wardle.* (*d*)].

Supposing the plea to be informal, the defendant is entitled to judgment for the insufficiency of the declaration. The breach is badly assigned. Consistently with the statements in the declaration, the action of replevin may have been properly commenced at the next county court, and may be still depending in the county court; *Jackson, Officer of the Sheriff of Warwick*, v. *Hanson.* (*e*)

TINDAL C. J. This is an action on a bond, made subject to a condition that *Edwards*, the obligor, should appear at the next county court, and then and there prosecute his suit against *Rider* the now plaintiff and *Bretherton*, for taking and detaining certain goods of the obligor. The breach assigned in the declaration is, that *Edwards* did not appear at the county court so holden next after the making of the bond, and then and there prosecute his suit with effect against *Rider* and *Bretherton*, according to the form and effect of the condition. The answer to the breach so assigned should have stated that the obligor did so appear, or it should have shewn facts which, according

(*a*) *Carthew*, 519. And see *Lane* v. *Foulk*, *Comberb.* 228.; *Gwillim* v. *Holbrook*, 1 *Bos. & Pull.* 410.; *Perreau* v. *Bevan*, 5 *B. & C.* 284., 8 *D. & R.* 72.

(*b*) 12 *East*, 585.

(*c*) And see *Thompson* v. *Farden*, *antè*, Vol. I. p. 535.

(*d*) 5 *B. & Ad.* 146., 2 *N. & M.* 703.

(*e*) 8 *M. & W.* 477., 1 *Dowl. P. C. New Series*, 69.

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to the practice of the county court, rendered his appe
ance unnecessary. We are not bound to take no
of the practice of the county court, and the plea d
not disclose it.

COLTMAN J. I cannot make out whether this is
tended as a plea of performance in denial of the bre
or a plea in excuse of performance: if the former,
plea should have concluded to the country; if
latter, it contains no sufficient excuse. A plea in ex
or in discharge of performance, should have sh
what the practice of the county court is.

ERSKINE J. I am of the same opinion. *Edw*
ought to have shewn that he did appear at the
county court, or that such appearance was not ne
sary to the prosecuting of the suit without delay.
is suggested that the sheriff had no authority to ta
bond in this form, and that the assignee of the sheri
entitled to sue so far only as the condition of the b
is in conformity with the terms of the statute. Ass
ing this to be so, the plea must be understood to im
either that *Edwards* did appear at the next county co
or that the omission was not of such a character
prevent the effectual prosecution of the suit without
lay. It is now said that the appearance of *Edward*
the next county court was unnecessary; but there i
allegation to that effect on the record. If it was m
to convey that *Edwards* was not bound to appear at
next county court, as he was required to do by
terms of the condition, the circumstances which rend
a literal compliance with those terms unnecessary, o
to have been shewn.

MAULE J. The defendant pleads, not that he
peared, but that *Rider* and *Bretherton* appeared,

that the suit is still depending. If the plea is to be taken as alleging that *Edwards* did appear, it ought to have concluded to the country. But in fact the plea contains no such allegation. The statement does not import that *Edwards* appeared. Then it is contended that he has shewn a sufficient excuse for not appearing; because the only object of an appearance on the part of the distrainee is, to enforce the appearance of the distrainor. If such excuse had been shewn, it would have been a good defence. But it was necessary to plead it. It has not been pleaded; and that for a very good reason. If the plea had truly stated the practice of the county court, it would have been seen, that before the distrainee appears, he causes the distrainor to be summoned, and then *he* appears. (*a*) In this case, *Edwards*, finding that *Rider* and *Bretherton* had entered an appearance, did not think fit to appear. He now comes here, and asks the court to assume that it was unnecessary for him to appear.

Judgment for the plaintiff.

(*a*) *Vide Greenwood on County Courts*, 20.; *Com. Dig.* tit. *County*, (C. 9. 12.)

1841.

June 4.

LESENBURY *v.* EVANS.

In assumpsit by *A.* upon an undertaking by *B.* to indemnify *A.* against all actions which might be brought by *C.*, and every other person or persons for or in respect of the rent *then due or to become due* for *Blackacre, claimed or to be claimed by him or them;* the declaration stated that *C.* brought an action against *A.* for rent of *Blackacre,* claimed to be due to *C.* for the occupation of *Blackacre,* for a certain time then elapsed, and that *A.* was called upon, and in order to prevent further proceedings in such action, *was forced and obliged to pay* the sum claimed and costs, and that *B.* had failed indemnify. Held, that the declaration was bad in substance, in not shewing the rent *claimed* to be due had, in fact, become due.

ASSUMPSIT, upon a contract of indemnity.

The declaration stated, that before the making of promise and undertaking of the defendant thereina mentioned, the plaintiff held and occupied a cert messuage, situate at *Broadwall,* in the county of *Sur* as tenant thereof to one *W. Cottage;* that before making of the said promise and undertaking, the fendant claimed title to the said messuage, and h before the making of the said promise and undertaki to wit, on the 4th of *January* 1840, commenced prosecuted a certain action in the Queen's Bench aga the now plaintiff, for a certain sum of money for r then alleged to be due from the now plaintiff to the n defendant, for and in respect of his occupation of said messuage; that thereupon, on the 3d of *Febru* 1840, in consideration that the now plaintiff, at request of the now defendant, would pay her amount of the money which she so claimed of the n plaintiff for rent for the occupation of the said messu by the now plaintiff, and for the recovery of which had commenced her action as aforesaid, the now fendant undertook and promised the now plaintiff indemnify him from all actions and suits which mi be brought by *Cottage* and every other person or p sons, for or in respect of the rent then due or to becc due for the said messuage, for the rent of which the tion was brought; provided that such rent to be the after claimed were paid to the now defendant. Av

ment: that the plaintiff, confiding in the said promise and undertaking, did afterwards, to wit, on the day and year aforesaid, pay to the now defendant the amount so claimed by her as aforesaid, for and in respect of the rent of the said messuage, and for which she had commenced the said action. That after the making of the said promise and undertaking, to wit, on the 6th of *January* 1841, *Cottage* commenced and prosecuted a certain action in this court against the now plaintiff for the sum of 8*l.* 1*s.* for rent of the said messuage, claimed to be due to him for the occupation of the said messuage for a certain time then elapsed; of which the defendant, on &c. had notice; and that such proceedings were thereupon had in the last-mentioned action, that afterwards, to wit, on the 26th of *January* 1841, the now plaintiff was called upon, and in order to prevent any further proceedings in the said action so commenced and prosecuted against him by *Cottage* as aforesaid, *was forced and obliged to pay*, and did then pay, a large sum of money, to wit, 8*l.* 1*s.*, the amount for which the last-mentioned action had been so commenced and prosecuted as aforesaid, and 3*l.* 12*s.* as and for the costs of the same action; and also the now plaintiff, by means of the premises, was forced and obliged to incur and sustain, and did incur, &c. great costs, &c., in and about the defence of the same action, and in and about settling and putting an end thereto; of all which premises the defendant, on, &c. had notice. Yet the defendant did not nor would indemnify the plaintiff from the said action so commenced and prosecuted against him by *Cottage* as aforesaid, in respect of the rent so due for the said messuage, and claimed by *Cottage* (although the rent for the occupation of the said messuage had, from the time of the making of the said promise and undertaking, been paid to the defendant), but had refused and neglected so to do.

General demurrer; and joinder.

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LESENBURY v. EVANS.

Stephen Serjt. in support of the demurrer. It do not appear by the declaration that any rent sued for *Cottage* was due to him at the time of the promise, that any became due afterwards. *Cottage* may ha brought his action for rent not really due to hi Though the declaration states that, the plaintiff bei called upon, was forced and obliged to pay, that nec sity may have arisen from his own insufficient defence a wrongful action.

Manning Serjt. *contrà*. A sufficient breach is assign in the declaration. A covenant or promise to indemn against the acts of *I. S.*, a specified individual, is an e gagement to indemnify against his acts, whether right or wrongful. (*a*) The indemnity is obscurely worde but its object clearly was, to indemnify the plaint against the *claims* of *Cottage*. The whole arrangeme proceeded upon the assumption that the defendant w the true owner, and that *Cottage* had no valid title the rent.

It may, moreover, be collected from the declarati that the plaintiff did not suffer judgment by default *Cottage*'s action. He could not have incurred the alleg obligation to pay, except by reason of the rent sued f being actually due to *Cottage*. Upon general demurr the declaration clearly contains a sufficient allegation a legal liability to pay, supposing such liability to necessary to support the action.

TINDAL C. J. The declaration does not sufficient connect the rent sued for, with that which formed t subject of the indemnity.

Leave to amend, on payment of cos

(*a*) See *Southgate* v. *Chaplin*, 1 *Comyns's Rep.* 230.; *Perry* v. *Edwards*, 1 *Stra.* 400.; *Nash* v. *Palmer*, 5 *M.* & 374.; *Fowle* v. *Welsh*, 1 *B.* *C.* 29., 2 *D.* & *R.* 133.

1841.

J. HOLMES, one of the Public Officers, &c., *v.* W. BELL.

15 Jur 229.

A., a banker, takes from *B.*, a customer, and *C.*, his surety, a bond, conditioned for the payment of all sums already advanced or thereafter to be advanced to *B.* There is no merger; and *B.* may be sued for the balance of his account as upon a debt by simple contract.

BY an order of nisi prius made at the *Yorkshire* spring assizes, 1840, as amended by a subsequent order of *Tindal* C. J., bearing date the 26th of *May* 1840, *it* was ordered that a verdict should be entered for the plaintiff, damages 10,000*l.* and costs 40*s.*, subject *to* the award of a barrister, to whom the above cause and all matters in difference (except a suit in equity, and the subject-matter thereof) between the said parties were referred; the award to be published as therein mentioned; and that if the arbitrator should so order, a verdict for the plaintiff, or a nonsuit or verdict for the defendant, should be entered as he should direct; and that he should raise, upon the face of his award, for the opinion of this court, the point relied on by the defendant — that this action should have been brought upon the bond hereinafter mentioned, and that assumpsit was not maintainable.

Award: — That in the month of *July* 1834, there was, and thence hitherto has been, at *Kingston-upon-Hull*, a certain banking company or copartnership, carrying on business under the style and firm of "*The Hull Banking Company*" under, and in conformity with, the provisions of the 7 *G.* 4. *c.* 46.; that in the same month the defendant opened an account with the said banking company, according to the usual course of dealing of the company; and that it was intended that such banking account should be continued; that at the date of the bond, and at the time of the deposit of the title deeds hereinafter first mentioned, *J. Holmes* and *J. Wade* in the bond mentioned, were the managing directors of the company; that at the date (*October* 31st, 1834) and execu-

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tion of the bond, the title deeds and writings there mentioned were deposited with *J. Holmes* and *Wade* such directors on behalf of the company, and at th same time the defendant and his brother *E. J. Be* executed a bond, purporting that they became held an firmly bound to *Holmes* and *Wade* "*and to the oth partners in the said company for the time being* (*a*), witho regard to any change whatever that should or might tak place in the partners, directors, or other officers of th company, in the penal sum of 10,000*l.* to be paid to th persons for the time being constituting the company, the certain attorney, public officer, or public officers or othe person or persons appointed for the time being to su on their behalf," subject to the following condition.

"Whereas the above bounden *W. Bell* has opene an account with the said company as his bankers, ac cording to the usual and ordinary course, and upon th terms, of business, done and to be done by the company and *W. Bell*, together with *E. J. Bell*, are seised of, o entitled to, certain messuages and hereditaments, situat in the market-place of the said town of *K.* &c. and ar possessed of or entitled to a certain fee-farm rent, rent charge, or annual sum, of 80*l.*, part of, &c.; and the sai company have agreed, during their pleasure, at the re quest of *W. Bell* to pay or advance moneys, to or for th use of *W. Bell* by payment of bills of exchange, drafts, o otherwise; and, in order to induce them to do so, *W Bell*, and, at his request *E. J. Bell* as his surety, have de posited in the hands of the directors of the company al the deeds and writings relating to the title of the sai messuages and hereditaments, and the said fee-farm rent, rent-charge, or annual sum, of 80*l.*, and have also proposed and agreed to enter into the above-written bond, subject to the condition hereinafter contained

(*a*) *Vide Metcalfe* v. *Bruin*, 2 *Campb.* 422., 12 *East*, 400. 2 *Wms. Saund.* 414 *a. n.* (*a*)

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Now the condition of the above written bond is such, that if the above bounden *W. Bell* and *E. J. Bell*, or either of them, or either of their heirs, executors, or administrators, or any of them, do and shall, from time to time, and at all times hereafter, upon or immediately after the expiration of a notice in writing to be given, by or on behalf of the directors or trustees, for the time being, of the company, to the said *W. Bell*, or left at his usual or last place of abode or business, three calendar months previously for that purpose, well and truly pay or cause to be paid unto the directors or trustees for the time being of the company, without regard to any change that may take place in the partners, members, or officers of the company, all and every sum and sums of money not exceeding in the whole 1000*l.*, or, if there shall be an excess of the sum of 8000*l.*, then the sum of 8000*l.* part of the sum or sums of money which, at the time of such demand, shall be due and owing to the company in respect of any cash, bills of exchange, or promissory notes, already lent, advanced, or paid, or hereafter to be lent, advanced, or paid, by, or on the acceptance of, the company, to, for, or on the account, or for the accommodation, of *W. Bell*, or which the company shall have engaged, or become liable, to pay for *W. Bell*, either alone or jointly with any other person or persons, together with interest, postages, stamps, commissions, discount, and all other usual and ordinary charges made by bankers to their customers; and if *W. Bell* and *E. J. Bell*, their heirs, executors, and administrators, shall and do, at their own proper costs and charges, when thereunto requested by the said directors, or the directors for the time being, of the company as aforesaid, or the major part of them, make and execute, or cause or procure to be made and executed, by the proper and necessary parties, a good and sufficient mortgage, or other assurance, of the said messuages and hereditaments and fee-farm rent, rent-

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charges (*a*), or annual sum of 80*l.* to the said directors their successors in office, or the trustees for the ti being of the company, their successors, heirs, executo administrators, and assigns, and with or without t usual powers of sale, as they shall think fit, for bet and more effectually securing to the company the mon which shall be due or owing to them at the time of su request for or by the reason or means or in mann aforesaid, not exceeding in the whole 8000*l.*, then &c.

The arbitrator then proceeded to state that the s banking account with the company continued to be c ried on, upon the security of the bond and deposit, to t date of the agreement of the 3d of *April* 1837, hereinaf stated, and without the defendant's having been call on by the company to execute any legal mortgage, wh it was agreed between the company and the defend that some further security should be given to the co pany for the said account, namely, the security me tioned in the memorandum of agreement hereinaf stated, and that the title deeds and writings in the s memorandum in that behalf mentioned should be posited with the company by way of further securit that such title deeds and writings were, by the defe ant, at the time of the date and execution of the agr ment hereinafter stated, deposited with the compa and that a memorandum of agreement, dated the 3d *April* 1837, was thereupon signed by the defendant a *E. J. Bell*, and delivered to the company; that the s *J. Holmes* and one *J. Hudson*, in the said memorandu mentioned, were at that time the two managing direct of the company, and that the said memorandum agreement, so far as material, was as follows: —

"Memorandum of an agreement made the 3d of *Ap* 1837, between *W. Bell* of, &c., and *E. J. Bell* of, & of the one part, and *J. Holmes* of, &c., and *J. Huds*

(*a*) *Vide antè*, Vol. II. p. 713. (*a*).

of, &c., two of the directors of the *Hull* Banking Company, of the other part. Whereas *W. Bell* keeps a banking account with the said company according to the usual and ordinary course and upon the terms of business done by them as bankers, and now is, or hereafter may become, indebted to the said banking company in several sums of money; and whereas for securing the repayment of any such sum or sums of money, *W. Bell* and *E. J. Bell* have deposited in the hands of the directors of the said company all and every the deeds and writings relating to the title to two messuages, &c., situate, &c.; and have agreed to execute a mortgage of the said messuages, &c. to *J. Holmes* and *J. Hudson*, or the directors and trustees for the time being of the company, at any time when thereunto required, as therein and hereinafter mentioned. Now these presents witness, and *W. Bell* and *E. J. Bell* do hereby declare and agree to and with *J. Holmes* and *J. Hudson*, as such directors as aforesaid, their successors in office, and the directors and trustees for the time being of the company, without regard to any change that may take place in the partners or members of the company, that the said several deeds and writings are so deposited with the said directors for the purposes aforesaid, and that *W. Bell* and *E. J. Bell* shall and will, at their own proper costs and charges, at any time when thereunto required by the said directors, or the directors, for the time being, of the company as aforesaid, or the major part of them, make and execute, or cause and procure to be made and executed, by the proper and necessary parties, a good and sufficient mortgage, or other assurance, of the said messuages &c. to the said directors or their successors in office, or to the trustees, for the time being, of the company, their successors, heirs, executors, administrators, and assigns, either by demise or in fee, and with or without the usual powers for sale, as they shall think fit, for better and more effectually securing to the company the repayment

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of all and every sum and sums of money which now is o
are, or at any time hereafter shall be, due and owing t
them in respect of any cash, bills of exchange, or pro
missory notes already lent, advanced, or paid by or on th
account of the company, to or for, or on the account, o
for the accommodation of *W. Bell*, or which the compan
shall have engaged, or become liable to pay for hi
W. Bell, either alone or jointly with any other perso
or persons, together with interest &c., so as that suc
sum or sums of money to be secured shall not excee
500*l.*, in addition to the sum of 5000*l.* already secure
by the joint and several bonds of *W. Bell* and *E. Bell*
and further, that in the meantime, and until full pay
ment of all such sum and sums of money as aforesaid
the said several deeds and writings shall remain an
continue in the custody or possession of the said di
rectors, or their successors in office, their successors
executors, administrators, or assigns, and shall be hel
and retained by them as a security for the repaymen
of such sum or sums of money as aforesaid."

The arbitrator also found, that, in *June* 1837, th
defendant was indebted to the company, and that th
directors did in that month cause a notice, dated the 21s
of *January* 1837, signed, by their direction, by the ge
neral manager of the company, to be served on the de
fendant, requiring him to pay to the company the amoun
owing by him to them, pursuant to the condition of th
bond; that the defendant did not, at the expiration o
three months from the date of the notice, or at any othe
time, pay to the company the debt owing by him to the
on the said account; that on the 1st of *October* 1839
4091*l.* 11*s.* 4*d.* was due from the defendant to th
company on the balance of the account; that on th
7th of *October* 1839, the action in which the order o
nisi prius was made, was commenced, for the recover
of the said balance with interest; that it was an actio
of indebitatus assumpsit, commenced and prosecuted b

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the plaintiff, being at the time one of the public officers of the company duly nominated, appointed, and registered in that behalf according to the act of parliament hereinbefore mentioned, as the nominal plaintiff for and on behalf of the company, and that the declaration contained counts for money lent and paid by the company to and for the defendant, for interest due to the company from the defendant, for work and labour done by the company for the defendant, and upon an account stated between the defendant and the company; and that the defendant pleaded non assumpsit, upon which plea issue was joined.

The arbitrator then awarded, that if, under the circumstances above stated, the court should be of opinion that the action of *assumpsit* was maintainable, notwithstanding the point raised by the defendant as aforesaid, viz., that the action should have been brought upon the bond, then the verdict was to be entered for the plaintiff for damages amounting to 4091*l.* 11*s.* 4*d.*, together with interest thereon at the rate of 5*l.* per centum per annum, from the 1st day of *October* 1839, to the day upon which the plaintiff shall be entitled to sign final judgment upon such verdict; but that if the court should be of opinion that the action of assumpsit was *not* maintainable by reason of the said objection, then the verdict found for the plaintiff was to be set aside, and, instead thereof, a nonsuit to be entered.

Channell Serjt. for the plaintiff. The bond was entered into by *two* persons; which is a circumstance to shew that, like the deposit of the deeds, it was given as a collateral security only. It could not have been intended that the company were to be without any remedy against the debtor during the three months, before the expiration of which period they could not sue upon the bond. The bond could cover only 5000*l.*, whereas the balance due

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from the defendant might exceed that amount; a case anticipated by the plaintiff.

But supposing the simple contract debt to be extinguished in the specialty (*a*), the merger should have been specially pleaded; *Weston* v. *Foster* (*b*); *Filmer* v. *Burnby*. (*c*)

Bompas Serjt., for the defendant, was at nisi prius. (*d*

TINDAL C. J. I cannot see why an action of *assumpsit* should not be maintainable in this case. The parties to the bond are not the parties between whom the original liability arose. (*e*) The bond was evidently intended only as a collateral security.

COLTMAN, ERSKINE, and MAULE, JJ. concurred.

Judgment for the plaintiff. (*g*

(*a*) Had the first answer been deemed insufficient, the second could scarcely have prevailed. To raise a question of merger it should have appeared that the whole, or some specific portion of the 4091*l.* 11*s.* 4*d.* was due before the bond was given. For there would not have been an existing debt by simple contract, in respect of moneys advanced after the making of the bond, supposing the contract by specialty to have been substituted for the liability by simple contract as to *further* advances, which the law would otherwise raise. Had this been a case for pleading a merger, the award would appear to have been void for uncertainty, in not distinguishing between the old and the new parts of the account.

(*b*) 2 *New Cases*, 693., 2 *Scott*, 155.

(*c*) *Antè*, Vol. II. p. 529. 2 *Scott*, *N. R.* 689., 9 *Dow* P. C. 466.

(*d*) The cases relied on by the defendant, were *Toussain* v. *Martinnant*, 2 *T. R.* 100. *Foster* v. *Allanson*, *Ib.* 479. *Randall* v. *Lynch*, 12 *East* 179.; *Schack* v. *Anthony*, 1 *M* & *S.* 573.; *Schlencker* v. *Moxey* 3 *B.* & *C.* 789., 5 *D.* & *R.* 747. *East India Company* v. *Lewis* 3 *Carr.* & *P.* 358.

(*e*) *Vide post*, 258.

(*g*) A guarantee by deed entered into by a third person at the time of the contracting of the original debt, does not extinguish the simple contract debt of the principal; *Whi* v. *Cuyler*, 6 *T. R.* 176., 1 *Esp* *N. P. C.* 200.; and see *anti* Vol. II. p. 648. (*a*).

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SARAH BRADLEY *v.* CARR, MAUDE, and WILKINSON.

June 12.

TROVER, to recover the value of a cow.

Carr pleaded, first, not guilty; secondly, that the plaintiff was not possessed: on which pleas issue was joined. The other defendants pleaded similar pleas.

At the trial, before *Rolfe* B., at the last summer assizes at *Lancaster*, it appeared that *Henry Bolton* having a demand against *William Bradley* for 100*l.* 19*s.* 11*d.*, caused an attachment to be issued out of the wapentake (or hundred) court of *Staincliffe*, in the county of *York*, under which a cow, the property of the plaintiff, the mother of *William Bradley*, was seized.

The attachment was in the following form: —

"Wapentake of *Staincliffe*, to wit. It is commanded that *Henry Maude* and *William Wilkinson*, bailiffs of the said wapentake, or some or one of them, attach *William Bradley*, by his goods and chattels, within &c., so that he appear at the next *court baron* of the most noble *William Spencer*, Duke of *Devonshire*, to be holden at *Gargrave*, in and for the wapentake aforesaid, on *Thursday* the 11th day of *June* next, to answer *Henry Bolton* in a plea of trespass on the case, to the damage of the said *Henry Bolton* of 109*l.* 19*s.* 11*d.* Given, under the seal of the said court, this 21st day of *May* 1840.

"By the court,

"*C. Carr*, Steward."

The defendant *Carr*, as stated at the foot of the attachment, was the steward of the wapentake. The other defendants to whom the attachment was directed, were not regular bailiffs of the court, but were parties named by *Bolton*, he giving an indemnity to *Carr*.

The steward of a hundred court, or of a court baron, is not responsible for the misfeasance in the execution of process of the bailiffs of the lord of the hundred or manor, to whom process of execution, awarded by such court, is usually directed.

Where, however, the steward directs process to persons named by the party suing out such process, taking an indemnity from such party, he is liable.

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William Bradley caused an appearance to be entere for him in the wapentake court, on the day after th seizure. The cow was demanded on behalf of Mr *Bradley*, but was not returned. The jury found a ver dict for the plaintiff, damages 18*l.*, leave being reserve to the defendant *Carr* to move to enter a verdict fo him on the first issue.

Talfourd Serjt. in *Michaelmas* term last, obtained rule nisi accordingly; and cited *Holroyd* v. *Breare* (*a* in which case it was held, that the steward of a cou baron is a *judicial* officer, and that trespass will not l against him where the lord's bailiff, by mistake, take the goods of *B.* under a precept, commanding him t take in execution the goods of *A.*

May 7. *Atcherley* Serjt., in *Easter* term last, shewed caus *Holroyd* v. *Breare* was admitted to be a case of the firs impression; it is a decision which stands upon no au thority, and which ought to be reconsidered. Even i that case it was not distinctly held, that the steward of court baron is a judicial officer. *Abbott* C. J., in deliverin judgment, says, "We are however of opinion that th steward is, not merely a minister of that court, but constituent and essential part of it. That court cannot b holden without him." (*b*) It is not easy to understan what is meant by the steward being a constituent an essential part of a court in which the *suitors* are the judge The old authorities clearly shew that he is only a minis terial officer. Lord *Coke*, in the 4 *Inst.* 268., speaking the court baron, says, "This is a court incident to ever manor (*c*), and is not of record; and the suitors be there judges, although the plea be holden by force of a wr

(*a*) 2 *B. & Ald.* 473.

(*b*) There appears, however, to be no objection to the lord's holding his own court witho a steward.

(*c*) See 5 *Mann. & R.* 143.

of right." And again in *Co. Litt.* 58., he says, "And it is to be understood that this court is of two natures: the first is by the common law, and is called a court-baron, as some have said, for that it is the freeholders or freemen's court; and of that court the freeholders, being suitors, be judges." "The second is a customary court; and that doth concern copyholders; and therein the lord, or his steward, is the judge. And as there may be a court-baron of freeholders only without copyholders, and then is the steward the *register* (*a*), so there may be a customary court of copyholders only without freeholders, and then is the lord, or his steward, the *judge*." (*b*)

The form of the process in this case shews, that it is not issued by the steward in a judicial character. The words, "By the court" "*Carr*, Steward," are nothing more than a mere *attestation* by that officer, that the process is correct. A sheriff, for certain purposes, is a judicial officer, and yet he is answerable for the acts of his bailiff. In *Saunderson* v. *Baker* (*c*), the responsibility of the sheriff is put on the ground of the inconvenience which would result, if parties were left to seek their remedy against the bailiff; whereas the sheriff may indemnify himself by taking security for the conduct of those to whom the execution of his mandates are entrusted. [*Coltman* J. The law casts upon the sheriff the execution of the process.] Here, the steward himself might execute the process; and if he chooses to employ others, he is liable for their acts. The policy of the law is, to give the party aggrieved a remedy against a known responsible person. (*d*) In *Woodgate* v.

(*a*) "Recorder," *post*, 245. (*a*)

(*b*) *Vide* 5 *Mann. & Ryl.* 143 (*a*), 2 *N. & M.* 383. 778., 4 *N. & M.* 693. (*a*).

(*c*) 3 *Wils.* 309. 2 *W. Bla.* 832.

(*d*) The county is responsible for the defaults of the coroners it elects; 4 *Inst.* 114.; the city of *London* is responsible for the defaults of the sheriffs it appoints; 11 *E.* 2., *Fitz. Abr. Dette*, pl. 172.; and who are said to be removable for insufficiency, 4 *Inst.* 114., and see *Memor. in Scacio*, 12.

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Knatchbull (*a*), it was held that a sheriff is liable for t extortion of his bailiff, and the grounds of the judgm there, are equally applicable to the present case.

Atcherley Serjt., on the following day, in continuati [*Coltman* J. referred to the case of *Tinsley* v. *Nassau* as confirming *Holroyd* v. *Breare*.] The ground which it was held in *Holroyd* v. *Breare*, that the stew of a court-baron was *not* responsible, shews that he responsible under the circumstances of the present c which must be governed by the same principle is acted upon in the ordinary case of a plaintiff send process to an officer appointed by himself. It is material here, whether *Bolton*'s name, or the name *Bolton*'s nominee, appears in the process. Upon well-known doctrine of principal and agent, if *Car* held liable, he will look to *Bolton* for indemnity; *Sa derson* v. *Baker*.

Even supposing that *Holroyd* v. *Breare* was prop decided, and that the bailiffs are not to be considered the agents of *Carr*, the object of the process was me to compel an appearance. An appearance having b duly entered, the cow was demanded, but was not turned. What right has an officer to detain goods a the object for which they were taken has been attain This is, in fact, the defence of *Bolton*, who indemni [*Coltman* J. It is not stated expressly that there ar bailiffs in the manor.] In manors there are bailiffs matter of course. (*c*) Here, however, the process

(*a*) 2 *T. R.* 148.

(*b*) *Mood. & Malk.* 52., 2 *C. & P.* 582. And see *Tunno* v. *Morris*, 2 *C. M. & R.* 298., 4 *Dowl. P. C.* 224., 1 *Gale*, 259.; *Pitcher* v. *King*, 1 *P. & D.* 297., *antè*, Vol. I. 546.(*b*).

(*c*) As to the bailiffs, or beadles, of a manor,—who are the lord's servants, entrusted with the care of his lands an collection of his rents, th sometimes elected and pres by the homage (3 *Mann.* 160, 161, 162. 176. 194. 210.),—see *Bac. Abr. B* (C. 4.); *Fleta*, lib. 2. cap 73.; *M.* 2 *R.* 3. fo. 14. pl *Rowleston* v. *Alman*, *Cr* 748.; 1 *Watk. Copyh.* 237,

not sent to the bailiffs. In sending the process to other persons, the defendant exceeded his authority, and thereby made himself personally liable for their acts; *Doswell* v. *Impey*. (*a*)

Talfourd Serjt., in support of the rule. In this case two questions of law arose, and one of fact. If *Carr* is to be made liable for the subsequent acts of the bailiffs, that point ought to have been taken at the trial. No complaint was then made that the cow had been improperly detained. One kind of property in goods, is sufficient as against a wrongdoer, another is required as against a party who has a *primâ facie* title.

With respect to the point of law, the court is requested by the plaintiff to overrule *Holroyd* v. *Breare*, a case which has been frequently recognised; *Tunno* v. *Morris*. (*b*) The case of the sheriff is an excepted case. If the indemnity given in this case should have been unnecessarily or illegally or criminally taken, that does not affect the judicial character of the steward. It appears doubtful whether the indemnity could be enforced. But if a judge were to take an indemnity upon a committal for contempt, he would not thereby become a trespasser. In *Doswell* v. *Impey* it was held, that commissioners of bankrupt were not liable to be sued in trespass for committing an examinant, who did not answer to their satisfaction. "If," says Lord *Tenterden*, "they do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such action." It may be right to add, that they would be liable if they acted *maliciously*. [*Coltman* J. Is there any authority to direct the process of the court to any officer except the bailiffs of the manor? *Bosanquet* J. Is any indemnity given by

(*a*) 1 *B. & C.* 163., 2 *D. & R.* 350. (*b*) *Antè*, p. 224 (*a*).

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the bailiffs? *Atcherley* Serjt. The bailiffs are appoint by the lord. *Bosanquet* J. If the bailiffs give securi to the lord and not to the steward, would not that sh that the steward is not liable? (*a*) *Tindal* C. J. I ha very great repugnance to saying that *Holroyd* v. *Brea* is not law.]

Cur. adv. vu

TINDAL C. J. now delivered the judgment of the cou

This was an action of trover to recover the value goods seized under a process of attachment, issuing o of the court-baron of the wapentake of *Staincliffe*, take the goods of a third party. The defendant *Ca* was the steward of the court, and pleaded two plea first, not guilty; secondly, that the plaintiff was n possessed of the goods in the declaration mentioned, of her own goods. The other two defendants were t bailiffs who made the seizure, and pleaded, separate the same pleas. On the trial a verdict was found plaintiff on all the pleas; but leave was reserved to mo to enter a verdict for the defendant *Carr* upon t general issue; and a rule nisi was obtained for th purpose, on the ground that the steward of a cou baron is not liable for the acts of the bailiffs e ployed to execute the process of the court; and the ca of *Holroyd* v. *Breare* was relied on, as establishing t doctrine contended for by the defendant *Carr*.

On shewing cause against the rule, two points we mainly insisted on. It was said, in the first place, th the case of *Holroyd* v. *Breare* was a case of the first i pression and ought to be reconsidered; and authorit were cited from 4 *Inst.* 268. and *Co. Litt.* 58., to she that a steward of a court baron is not a judicial offic But it seems to us to be a sufficient answer to say, th

(*a*) *Quære*, whether *any* is given by the bailiffs of a *hundred*. It would hardly be given by the bailiffs of a *manor*. *V antè*, 224. (*c*), *post*, 227. (*a*

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the very same authorities were relied on in the argument of *Holroyd* v. *Breare*, without success. And we see no reason for dissenting from the decision of that case, pronounced as it was by judges of high authority, after deliberate consideration, and on reasons which appear to us to be satisfactory. (*a*)

The second point relied on was, that in the present case the attachment had been issued to certain bailiffs, specially nominated to the steward by the attorney who had sued out the process, and that the steward had required an indemnity to be given to him by such attorney, before he would give out the process. And we are of opinion, on this point, with the plaintiff; for although the steward would not be liable to an action where the process is, as in regular course it ought to be, directed to the bailiff or the bailiffs of the court, *Com. Dig.* tit. *County*, (C. 9.), it is otherwise, we think, when the steward so far mixes himself up personally with the party in the cause, as to issue the writ to special bailiffs nominated by the attorney of that party, and to take an indemnity to protect himself against the consequences of any misconduct on their part. Under such circumstances, the steward may reasonably be considered as having identified himself with the special bailiffs, and as having sanctioned what they might do in executing the process.

We think, therefore, the steward has made himself liable, and that the rule must be discharged.

Rule discharged.

(*a*) "In every court-baron the plea is properly before the suitors, as judges, and before the steward, as *recorder*, thereof;" *per Hankford* (then, in 1404–5., Justice of C. P., afterwards, in 1414, Chief Justice of K. B.), *H.* 6 *H.* 4. fo. 1. pl. 3.; and see *M.* 6 *E.* 4. fo. 3. pl. 9. *antè*, 223. The hundred court (being a branch of the county court), is in the nature of a court baron, and it is so designated in the attachment in this case, *antè*, 221. As to the wapentake or *hundred* of *Staincliffe*, see *Rot. Orig. Abbr.* 321 *b.*, *Cal. Rot. Pat.* 258 *b.*

The same person may be judge and officer, *diversis respectibus; Crane* v. *Holland*, *Cro. Car.* 138., *Sir W. Jones*, 193. And see *Rex* v. *Joliffe*, 2 *B. & C.* 54. 57., 3 *D. & R.* 240.

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June 5.

STEVENS *v.* MILLER.

A judge's order, by consent, allowing the plaintiff to enter up judgment in default of payment of debt and costs in a certain time, is not void under 1 & 2 *Vict. c.* 110. *s.* 9. by reason of no attorney having been present.

BOMPAS had obtained a rule calling upon the plaintiff to shew cause, why an order made by *Maule* allowing the plaintiff to sign final judgment in t event of the nonpayment of the debt and costs this action, and also the judgment signed in pursuan of such order should not be set aside. — The ord had been made by consent; but it was contended th the proceeding was an evasion of the 1 & 2 *Vict. c.* 11 *s.* 9., which requires the presence of an attorney when cognovit or a warrant of attorney is executed.

Andrews Serjt. now shewed cause. The object this application appears to be, to bring before the cou the validity of judgments by consent under a judg order. The case is not within the statute; and no fra is suggested.

Bompas Serjt. in support of the rule. The consent given, not by the attorney in the cause, but by the d fendant himself. [*Tindal* C. J. This case is not with the *letter* of the act. *Maule* J. Suppose the act h omitted either the cognovit or the warrant of attorne is it contended that the omission could be supplied the court?] If the party had come before the jud by attorney, it would have been a proceeding in t cause. [*Erskine* J. Parties frequently appear at cha bers without an attorney.] This is a warrant of att ney under another name. [*Maule* J. Unless it under the *same* name, we cannot interfere.]

TINDAL C. J. These orders are seldom allowed be drawn up until the judge by whom they are mad has had the parties before him, thereby excluding t

danger of those evils arising, which it was the object of the legislature, in the case of cognovits and warrants of attorney, to prevent. Such orders are neither within the terms nor within the meaning of the statute.

COLTMAN, ERSKINE, and MAULE JJ. concurred.

Rule discharged with costs. (*a*)

(*a*) *Braine* v. *Manson*, 9 *Dowl. P. C.* 748.

DOE dem. EDWARDS *v.* LEACH.

June 9.

In ejectment, the demise was laid on a day prior to that on which the right of entry (for forfeiture) accrued. Held, that it was competent to the judge at nisi prius to amend the declaration by substituting a day on which the right of entry was complete.

EJECTMENT, on a demise laid on the 15th of *January* 1841, brought in respect of a right of re-entry incurred by nonpayment of rent. At the trial before *Parke* B. at the last spring assizes for the county of *Surrey*, it was insisted for the defendant, that the right of entry did not accrue until the 16th, the rent having become due on the 25th of *December*, and the proviso for re-entry being, to take effect in case the rent should be unpaid for twenty-one days *after* that time. (*a*) The learned baron, on the application of the plaintiff's counsel, amended the declaration by altering the day of the demise (*b*) to the 16th of *January*, leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the demise on the 15th was too soon, and that the learned judge had no power, under the 3 & 4 *W.* 4. *c.* 42. *s.* 23., to make the amendment.

Wilde Solicitor-General, having obtained a rule nisi accordingly, in last *Easter* term,

(*a*) *Vide antè*, 158. 166 (*b*).

(*b*) The day of the demise appears to be material, not *per se*, but because the lessee is stated to have *entered* on the *same* day. *Vide post*, 244. n.

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Channell Serjt. now shewed cause. [*Tindal* C. J. First consider the question, — whether the judge h power to make this amendment.] It is said, that the can be no amendment in ejectment for a forfeitur but the law is clearly otherwise. In *Doe dem. Marri* v. *Edwards* (*a*), which, like the present case, was ejectment for a forfeiture, the same learned bar amended the name of the parish (*b*) in which t premises were situated, although it was contend that the amendment ought not to be made, the acti being, it was said, a harsh and oppressive proceedi on the part of the landlord. The argument up which this rule was obtained, would go the length shewing that actions of ejectment were not within t statute of 3 & 4 *W.* 4. *c.* 42. *s.* 23. The circumstance the demise being altogether a fiction, furnishes an ad tional reason why the amendment made here shou be allowed; and the courts have always acted on t principle, that the fictitious proceedings of an ejectme should not operate to the prejudice of the parties the suit. *Roe dem. Wrangham* v. *Hersey.* (*c*) [*Erskine* The difficulty in your case is, whether there is a varian between the record and the proof.] If there had be an actual lease executed on the 16th, the court wou have amended the record by altering the day of t alleged demise from the 15th to the 16th. [*Ti dal* C. J. You affirm that the lease, if produced, wou appear to have been made on the 16th. (*d*)] Had th

(*a*) 1 *Moo. & R.* 319., 6 *C. & P.* 208.

(*b*) In the old entries the parish, except in *London*, is seldom mentioned; and *quære* as to the necessity of alleging a *vill*, or a *lieu conus*, and whether, since the jury have come *de corpore comitatûs*, the statement of the county only is not sufficient.

(*c*) 3 *Wils.* 274.

(*d*) *Quære*, whether the co sent rule entered into by t tenant, but made in the origi action against the casual ejecto may not be considered as "document on which the s (against the tenant) is proceeding" within the meaning the 3 & 4 *W.* 4. *c.* 42. *s.* 23.

not been so, the judge would not have amended. [*Coltman* J. If there had been an actual lease on the 15th, there could have been no amendment. Does not the defendant agree to admit a lease of the date mentioned in the declaration? (*a*)] In *Smith* v. *Knowelden* (*b*), an action for defamation was held to be within the statute. There, the attempt to limit the operation of the statute by referring to the words "by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence," was unsuccessful. In *Doe dem. Marriott* v. *Edwards* the defendant had admitted a lease of a particular date, of lands situate at a particular place. If this is a good objection, it ought to have prevailed in that case. [*Erskine* J. There the amendment would be in the demise.] The amendment in this case would also be in the demise. (*c*) The language of the concluding part of the twenty-third section is large enough to enable the court to direct such an amendment to be made.

Bompas Serjt. in support of the rule. This case differs from those which have been cited, and the amendment made is neither within the words nor within the spirit of the act. This is not the ordinary case of a variance between the declaration and the proof; for it is only by reason of the admission of a lease by the defendant in the consent rule, that any demise is made out; and, consequently, an amendment of the declaration in this respect is in effect an amendment of the consent rule, over which the learned judge clearly had no power. The consent rule is a rule made in the original

(*a*) *Vide post*, 251. (*a*)

(*b*) *Antè*, Vol. II. p. 561.

(*c*) In *Doe* v. *Edwards* the amendment was, *in the terms of the demise*. Here, the amendment was in the time *at which*, not *from which*, the demise was made. Except in leases to take effect *in futuro*, the *habendum*, though nominally from a bygone period, operates from the making of the demise.

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action against the casual ejector. [*Erskine* J. Your argument appears equally to the amendment made in *Doe dem. Marriott* v. *Edwards.*] There the objection does not appear to have been raised, and the decision was merely a ruling at nisi prius, and by the same learned judge who reserved the present question for the consideration of this court. There is no authority bearing precisely on the point. The tendency of *Doe dem. Poole* v. *Errington* (*a*) is rather in favour of the defendant. There, *Taunton* J. having held at nisi prius, that a count in ejectment laying a joint demise by two, was not supported by proving the two to be entitled as tenants in common (*b*), refused, on this objection being taken, to amend the record by altering the demise and the plaintiff having thereupon been nonsuited, the court of Queen's Bench would not allow the propriety of the refusal to be discussed in banc.

TINDAL C. J. The only question in this case is whether or not the amendment, directed by the learned baron who tried the cause, was one which he had authority to make; for if it was such an amendment we cannot inquire into the propriety of making it but must assume that it was in a particular "not material to the merits of the case," and that by making it the defendant was not "prejudiced in the conduct of his defence." It appears to me that, by the 3 & 4 *W.* 4. *c.* 42. *s.* 23., the learned judge had power to direct the amendment in question. The form of declaration in ejectment is to this effect: — "*John Doe* complains, for that one *A. B.* (the lessor of the plaintiff), on a certain day demised to the said *John Doe* a certain messuage with its appurtenances, in a certain county; and that afterwards the said *John Doe* entered and became possessed of the said messuage

(*a*) 1 *A.* & *E.* 750., 3 *N.* & *M.* 646.

(*b*) *Vide* 3 *N.* & *M.* 652.

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&c.; and that *John Doe* so being so possessed, the said *Richard Roe*, afterwards &c., with force and arms, entered into the same, and ejected the said *John Doe*." When the declaration is delivered, and the tenant is admitted to appear and defend, he enters into a consent rule, by which he is bound to appear, by himself or his attorney, to accept a fresh declaration, and to confess lease, entry, and ouster upon the trial. The allegation in the declaration is, that the lessor of the plaintiff, upon a given day, executed a lease to the latter. The statute empowers the judge to amend the record "when any variance shall appear between the proof and the recital, or setting forth on the record, &c., of any contract, custom, prescription, name, or *other matter* in any particular or particulars in the judgment of such judge, &c., not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence." How can it be said that the averment in the declaration, that the lessor executed a lease of the premises, is not a matter alleged on the record, which is amenable under the act? It seems to me that here, there was a variance between the allegation of the lease and the proof, the amendment of which is clearly warranted by the statute. But it is said, that the consent rule is the only evidence of the demise, and that any alteration in the latter operates as an improper interference with the terms of the defendant's admission. It is to be observed, however, that on the amendment being made, the declaration is to be considered as having been always in its amended form, and the consent rule is to be taken as applicable thereto. (*a*) I think, therefore, that

(*a*) The declaration in the action against the casual ejector was not amended. Supposing, therefore, the declaration in the substituted action against *Edwards* to be read as having contained, from its first coming into existence, — *i. e.* from the

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the case is free from the difficulty which has been suggested, and that the rule must be discharged.

Coltman J. I concur with my lord in thinking that this rule must be discharged. The objection urged on the part of the defendant, overlooks the real nature of an ejectment, — that it is altogether a fictitious proceeding, which may be called the creature of the court. In this case, the declaration, in substance, asserted that the plaintiff had a right of entry on the 15th of *January*, and the proof was, that such right did not accrue until the 16th. It seems to me, therefore, that this was a variance, which, keeping in mind the nature of the action, falls fairly within the provisions of the statute. In many instances, undoubtedly, it may be material to the merits whether the right of entry accrued on one day or the other; and in such a case, the judge would, in all probability, refuse to amend the variance. The question, however, whether this amendment was material to the merits of the case, does not, strictly speaking, arise before us, but it seems to me that the learned judge exercised a very proper discretion.

Erskine J. I also am of opinion that the learned judge had power to make this amendment. If we were to allow ourselves to be fettered by the technical form of an ejectment, we might probably come to the conclusion, for the reason assigned on the part of the defendant, that the present amendment is not within the statute. *Doe dem. Marriott* v. *Edwards* was a much stronger case than this; for there an amendment was

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delivery of the issue in the substituted action, — a demise on the 16th, would an attachment have lain for not confessing a lease on the 16th, against a party who might, with *apparent* justice, at least, say, *non hæc in fœdera veni?* If not, could an award of execution be obtained upon the judgment signed against the casual ejector?

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made in the parish wherein the premises were situate, although the name of the parish is always specified in the consent rule. (*a*)

We must look, not at the technical form of the action, but at the substance of the question which the parties are prepared to try. Here, the substance of the inquiry was, when the plaintiff's right of entry attached. If that be so, then a statement in the declaration being, that the right of entry accrued on the 15th, and the evidence being, that it did not accrue until the 16th, there was a variance between the proof and the formal statement on the record, not material to the merits, and which falls clearly within the provisions of the statute.

MAULE J. The substance and legal meaning of the declaration, taken in connection with the other proceedings, is, that on the 15th of *January* the lessor of the plaintiff had a right of entry upon the premises in question. The evidence given was, that the right did not accrue until the 16th. That is a variance between a matter stated on the record, and the proof, which appears to me to fall within the express words of the statute. It has been urged that the consent rule applies only to the declaration served, and to the demise therein set forth; but that is not the true construction of the consent rule. By the terms of the rule, the defendant undertakes to accept, not any particular declaration, but *a* declaration, and to plead the general issue thereto, and, at the trial, to confess lease, entry, and ouster, which are mere matters of form, adopted to enable the parties more conveniently to try the question between them. The consent is, to confess *any* lease, &c. that will establish the title of the lessor of the

(*a*) The margin of the consent rule, instead of *describing* the tenements in the possession of the tenant, almost invariably follows the language of the declaration against the casual ejector, in which declaration a parish is usually stated.

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plaintiff (*a*); and the rule must be considered with reference to the general state of the law, which allows amendments to be made at nisi prius, and of which the defendant must be assumed to have been cognizant when he entered into the rule. The consent rule is, therefore, equally applicable to the declaration after the latter is amended, as it was in its original form.

Rule discharged.

(*a*) *Quære*, whether a tenant, having entered into a consent rule, would be bound to accept an issue under which the plaintiff might prove a right of entry in his lessor, varying, by a year or a day, from that which he had set up in his declaration against the casual ejector.

June 11.

In re Alice Shaw.

The acknowledgment of a deed by a married woman, under the 3 & 4 *W.* 4. *c.* 74., where the affidavit verifying such acknowledgment, varied, in its title and commencement, from the form prescribed by the rule of *H. T.* 4 *W.* 4. was allowed to pass; the affidavit being one upon which perjury could be assigned.

Talfourd Serjt. moved that the certificate of acknowledgment of a deed by a married woman, since deceased, might be received and filed, pursuant to the provisions of the 3 & 4 *W.* 4. *c.* 74.

The proceedings were regular, except in the title and commencement of the affidavit verifying the acknowledgment, which, instead of being in the form prescribed by the rules of *H. T.* 4 *W.* 4. (*a*), was as follows: —

"Commonwealth of *Pennsylvania*, City of *Philadelphia*, to wit. — Be it remembered that on the 10th day of *December* 1840, before me *John Binns*, Esq., an alderman of and for the city of *Philadelphia*, in the commonwealth of *Pennsylvania*, personally came *John Slack*, one of the commissioners mentioned in the certificate hereunto annexed, who, being first duly sworn according to law, *did depose and say*, that he knows *Alice Shaw*," &c.

(*a*) See 10 *Bingh.* 462.

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In the subsequent parts of the document the words "and this deponent further saith" were used. It was signed by the deponent, and was stated to be

"Sworn and subscribed, before me, the day and year aforesaid. Witness, my hand and seal

(L.S.) "*John Binns*, Alderman of the "City of *Philadelphia*."

The notarial certificate was in the usual form.

Talfourd Serjt. stated that the officer of the court had raised an objection that the affidavit did not comply with the provisions of the rule of court, by which it is ordered (*a*) "that the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary; or such affidavit may be made, where it is found convenient by one of the said commissioners, with such variations in the form thereof as shall be necessary in that behalf." [*Tindal* C. J. This is certainly a very unnecessary departure from the form prescribed.] It is submitted that is an immaterial variation; and that the document is as much an affidavit, as it would have been if it had been drawn up in the exact words of the form given.

TINDAL C. J. It appeared doubtful, at first sight, whether this was an affidavit on which perjury could be assigned, as it begins with a mere recital that *Slack* came before the alderman and made a deposition. The document, however, afterwards assumes the ordinary form of an affidavit, and is signed by the deponent, and is accompanied by the usual notarial certificate that the deponent had been sworn. I think, therefore, that it may pass.

Order made. (*b*)

(*a*) See 10 *Bingh.* 460.

(*b*) And see *Hayes on Conveyancing*, 5th edit. vol. ii. p. 246.

June 12.

FISHER *v.* DUDDING.

The time of entering of the judgment, from which period interest is given on the judgment debt by 1 & 2 *Vict. c.* 110. *s.* 17., is the day on which judgment is signed in the master's book, and not the day on which the roll is carried in and the judgment entered of record.

ON the 8th of *January* 1841, on which day fina judgment had been signed for 630*l.* 15*s.* 6*d.* a the amount of debt and costs, a summons was take out to review the taxation of costs. The learned judg before whom the summons was returned, referred th parties to the court; and, in the result a further sum o 12*l.* 10*s.* was allowed for costs. On the 20th of *May* the 12*l.* 10*s.* was added by the master to the amount but no alteration was made in the date of the allocatur and the judgment in the master's book then stood as judgment, for 643*l.* 5*s.* 6*d.*, of the 8th of *January*. O the same 20th of *May*, the total amount of the deb and of the costs so increased, was paid and received without prejudice, the plaintiff claiming interest on th 643*l.* 5*s.* 6*d.* from the 8th of *January*.

So, although the entry in the master's book has been amended upon a revision of the taxation of costs, the original date of the entry in the master's book remaining unaltered.

Goulburn Serjt. now moved for a rule, calling upo the plaintiff to shew cause, why satisfaction should no be entered on the record, the sum recovered by th judgment having been paid.

Bompas Serjt. shewed cause in the first instance. (*a*) By the act for the abolition of imprisonment fo debt (*b*), it is enacted, sect. 17. "That every judg ment debt shall carry interest, at the rate of 4*l.* pe centum per annum, from the time of entering up th judgment,—or from the time of the commencement o this act in cases of judgments then entered up, an not carrying interest,—until the same shall be satisfied

(*a*) *Vide post*, 242. (*b*). (*b*) 1 & 2 *Vict. c.* 110.

and such interest may be levied under a writ of execution on such judgment."

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Here, the plaintiff is entitled to interest from the 8th of *January*. From the moment at which the amendment was made, the allocatur must be looked upon as if originally entered in the amended form. This is also the rule with respect to amendments in pleadings, as well as in all other cases.

Goulburn Serjt. in support of the rule. The statute gives interest from the time of *entering up* the judgment on the judgment roll, not from the day on which it is signed in the master's book. But for a delay not occasioned by any fault of the defendants, the debt would have been paid as soon as the judgment was signed. It would, therefore, be unreasonable that the defendants should be required to pay interest upon a sum lying at their bankers, from which, as they were liable to be called upon by the plaintiff for payment, they could derive no benefit.

TINDAL C. J. This application must be governed by the true construction of the term "entering up judgment" which occurs in the statute, without reference to any hardship, real or supposed, in this particular case. The time of entering up the judgment appears to me to be the day on which judgment is signed, and an incipitur entered, in the book kept by the officer of the court for that purpose. The party who signs the judgment has two terms for carrying in the roll, and then entering the judgment of record. But, when so entered, the judgment is entered as of the day on which it was signed. By the fourteenth section of the statute of frauds (*a*), the officer who signs the judgment is re-

(*a*) 29 *Car.* 2. *c.* 3.

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quired to "set down the day of the month and yea his so doing, upon the paper-book, docket, or reco he shall so sign," and to enter such day "upon margin of the roll of the record where such judgm shall be entered;" and by the following section it enacted, "that such judgments, as against purcha*bonâ fide* for valuable consideration, of lands, te ments, or hereditaments, to be charged thereby, sh in consideration of law, be judgments only from s time as they shall be so signed, and shall not relat the first day of the term whereof they are entered, the day of the return of the original or filing the bail any law, usage, or course of any court, to the contr notwithstanding." (*b*)

The day of signing the judgment, therefore, is time from which the lands, tenements, and hered ments are bound; and though the terms used in late statute are not "signing," but "entering up," language used by the legislature must be construed reference to the known existing practice. Nor do I any hardship in this particular case. The defend might have relieved themselves from the liability to interest, by making a tender (*c*), which would afforded an answer to any action brought for the terest. (*d*)

(*a*) A misprint in the statute book, no doubt, for "bill."

(*b*) It appears, however, that before this statute, the lands were bound, not from the return of the original or the filing of the bill, but from the first day of the term in, or, as of, which the judgment was given; 1 *Roll. Abr.* 892. pl. 12., 10 *Vin. Abr.* 563.; or from the day on which the verdict was given. *Ib.* pl. 4., and *Registr. Brev. Orig.* 25 *b.*

(*c*) The plaintiff had judgment for 643*l.* 5*s.* 6*d.* as of the 8th of *January* 1841, and that is the sum which carried terest. But until the 20t *May* 1841, the defendants ignorant of the amount which judgment would tered *as of the* 8*th of Jan* If they had tendered 15*s.* 6*d.* they would still been liable to an execution having tendered the 12*l.* They could not *know* tha master would not make duction from the 630*l.* 15

(*d*) The words of the tute are (*antè* 238.) "and interest may be levied un

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COLTMAN J. It appears to me that the words "entering up the judgment" in the late statute, mean "signing of the judgment in the master's book." That entry, when amended, stands as if it had originally been made in its amended form. The amendment is to be regarded as the mere correction of a mistake.

ERSKINE J. We must refer to the state of the law and the practice of the courts, as known to exist at the time of the passing of the 1 & 2 *Vict. c.* 110., to ascertain what is meant by "entering up the judgment." Looking at the statute, in connexion with the former law and practice, the time from which the interest is to run, appears to be, the time of signing judgment by entering an incipitur in the master's book, and not the time of the formal entry on the judgment roll.

MAULE J. The whole of the judgment pronounced, or supposed to be pronounced, by the court, is considered as entered in the master's book. The entry in the book contains the materials for a more formal record, whenever such formal record may be required. The same course prevails with reference to criminal proceedings at the quarter sessions. The judgment, when wanted for any particular purpose, is drawn up from notes taken at the time by the clerk of the peace. Here, the legislature, when speaking of entering up the judgment, cannot have meant the entering of judgment upon the judgment roll. The enactment must be understood with reference to the then existing practice.

The legislature appears to have considered the plaintiff as entitled to interest at 4 per cent. upon the judg-

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writ of execution." *Quære*, whether, for this statutory right, the plaintiff is not confined to his statutory remedy; *quære*, also, whether a tender would authorise the court to interfere for the purpose of depriving him of such statutory right.

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ment debt. That is independent of the time at whi the right to the costs attaches. (*a*)

Then it is said that it will be unjust to visit the d fendants with a demand of interest, the delay havi arisen from the act of the plaintiff, or from the defa of the court through its taxing officer. But if the mon was lying unemployed at the defendants' bankers, which we know nothing, it was their own fault.

Rule discharged.

(*a*) The statute gives interest upon the whole sum recovered, both debt and costs.

(*b*) It had been agreed t the costs should be paid by unsuccessful party.

June 1. 12.

HALL *v.* BALL.

In trover for an expired lease, by lessor, the lease (or counterpart executed by the lessor) not being produced by the defendant, upon notice, it was held, that the lessor might give parol evidence of the contents without producing the counterpart (*a*) executed by the lessee.

TROVER, for an indenture of lease, bearing date 27th of *February* 1824, made between the plai and one *T. Spratley*, purporting to be a demise premises in *Middlesex*, for a term therein mentio subject to a proviso, therein contained, for the de mining of the term and for the reverting of the mises to the plaintiff, and which was alleged to h reverted to the plaintiff by reason of the determina thereof according to the said proviso.

Plea: that the plaintiff was not possessed.

At the trial, before *Coltman* J., at the sittings at *W minster* in last *Hilary* term, it appeared that, upon

Held, that after the expiration of a lease (containing covenants by the le the lessor is not entitled to the possession of the indenture as against the le

(*a*) The part executed by the lessee would appear to be the *primary* part as to his covenants, and as to his ass the proviso for re-entry, *F* v. *Morrice*, 3 *B. & Ad.* 3

granting of the lease, a counterpart was executed by *Spratley*, who afterwards deposited the lease with the defendant as a security for a debt.

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Rent being in arrear, and the premises out of repair, a declaration in ejectment was served upon *Spratley*, and judgment was signed against the casual ejector. *Spratley* did not appear or make himself a defendant.

To shew the reservation of a right of re-entry to the plaintiff, the defendant was called upon to produce the lease, pursuant to notice to that effect. Upon its non-production, the attorney who had prepared the lease, was called to prove the contents. It was objected, by *Atcherley* Serjt. for the defendant, that the counterpart ought to be produced. To which it was answered by *Bompas* Serjt. for the plaintiff, that the counterpart was only secondary evidence (*a*), and that there being no degrees in secondary evidence, the recollection of the attorney was not less admissible than the counterpart; and that the defendant could not be injured by any mistake made by the witness, which, as he held the lease, he could instantly correct. The objection being over-ruled, the attorney stated, that he had no recollection as to the contents of this particular lease, but that, from his course of practice, he entertained no doubt the lease contained a clause of re-entry for non-payment of rent and non-reparation of the premises. No evidence was given of an actual entry by the plaintiff, or of the execution of any writ of *habere facias possessionem*. (*b*)

(*a*) As a deposit of the lease, without an assignment or other conveyance, creates no *privity of estate* between the lessee and the defendant, the latter would appear to be a mere stranger to the deed, unless the lessee is to be considered as having an absolute power of disposal over the instrument independently of any lien in respect of covenants broken by the lessor.

(*b*) The lease must be taken to have contained, not a proviso for making the demise void in the event of the rent being unpaid or the premises unrepaired, but an option merely to the lessor to enter, and thereby determine the term, as upon the

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It was contended, on the part of the defendant, tha the evidence of the existence of a power of re-entry wa too loose and indistinct, — that if such power existed

breach of a condition subsequent. Until the actual entry of the lessor after condition broken, the term would remain undetermined, and the question as to the right to the possession of the indenture, after a determination of the term resulting from a forfeiture or otherwise, could hardly be said to arise. The service of the declaration in ejectment upon *Spratley*, and the signing of judgment against the casual ejector, were merely steps *towards* the effecting of an actual entry under the sanction of a writ of *habere facias possessionem*; but an entry, for the purpose of determining the term, in all cases where there is no reason to apprehend a breach of the peace, might be made by the lessor, *proprio motu*, without the observance of any formality whatever.

Where ejectment is brought to enforce a forfeiture, it is true that the demise and the entry of the lessee are commonly laid on a day when no entry has in fact been made by the lessor, and when, therefore, the lease, though it may be determinable, is not determined. But, in order to put an end to a defeasible estate by the exercise of a right of entry, it is not necessary that the party should himself enter; he may make a demise to another, and upon the entry of the lessee, the estate will be defeated, not, indeed, from the time of the demise, but from the time of the entry of such lessee. A the trial of the action of ejec ment, the defendant, in pu suance of the engagement co tained in the consent rule, a mits that the claimant demis to *John Doe*, and that *Do* under that demise, *entered*. I therefore, the claimant proves right to make such a demise, a to authorise such an entry, I shews a title in *Doe* to recov a verdict. Under this verdi *Doe* has a title of possession, and, consequently, a right recover the mesne profits, — *against the defendant*, from t time of his alleged entry, though, *in rei veritate*, the e tate of the defendant continu to subsist down to the ti when an actual entry is ma under the *habere facias poss sionem* or otherwise. This di tinction is not unimportant, it follows that where, after recovery in ejectment, an acti is brought for mesne prof against a person not estopp by the verdict, the plaintiff not entitled to go back furth than the day of the *actual* entr Nor can an action for use a occupation be maintained f the period intervening betwe the day of the demise and ent laid in the declaration, and t day of the actual entry up the execution of the *habe facias*; because, as the origin demise still subsisted, no re contract can be implied. O the other hand, when an ejec ment is brought, not against t

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the judgment obtained against the casual ejector was not evidence of a forfeiture, — and that supposing a power of re-entry to have been contained in the lease, and a right of re-entry to have accrued to the plaintiff, the defendant was entitled to a verdict upon the traverse taken by his plea, no property in, or right to the possession of, the lease having vested in the plaintiff. It was answered, on the part of the plaintiff, that the term had been determined by the forfeiture, and that the expired lease had thereupon become one of the muniments of the lessor's title.

The learned judge directed a verdict to be entered for the plaintiff, giving leave to the defendant to move to enter a nonsuit, should the court be of opinion that the right of possession was not vested in the plaintiff.

Atcherley Serjt., in *Hilary* term last, moved either to enter a nonsuit on the point reserved, or, failing that, for a new trial, on the ground that the evidence of the contents of the lease had been improperly received. *Jan.* 26.

It has no where been held that the lessor is, immediately after the determination of the lease, entitled to demand possession of the indenture of demise. The case in the *Year-Book* of 38 *H.* 6. fo. 24. (*a*), which has

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original lessee, but against an assignee or a stranger, the verdict and judgment in ejectment will be no bar to an action against the lessee for rent accruing at any time before the execution of the *habere facias*. A stranger not being bound by the estoppel arising out of the verdict, is not capable of taking advantage of such estoppel.

(*a*) P. 38 *H.* 6. fo. 24. pl. 1. There, in detinue for four charters, it was stated, in the declaration, that the second of the instruments sued for, was a deed of gift in tail, whereby the plaintiff's ancestor gave lands to such a one in tail, and that the donee died without heir (to the entail.) It was objected, by *Littleton* Serjt., for the defendant, that the deed having belonged to the donee, would vest, upon his death, in his executor, because it was his own deed; "but if the action had been brought for the other part sealed by the donee, peradventure, it ought to belong

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been supposed to establish that point (*a*), only shew that the heir is entitled as against the executor. (*b*) I the *King* v. *North Bedburn* (*c*), it was said by *Buller* J. (*d* that after the expiration of the term, the pauper (th lessee) was, in strictness, entitled to the possession the agreement under which he had held. Here, an ejec ment was brought by the plaintiff against *Spratley*, wh did not appear to defend; and although judgment w signed against the casual ejector, that is immaterial, as writ of *habere facias possessionem* issued. Parol eviden of the contents of the lease ought not to have been a mitted, the plaintiff being in possession of a counte part; *Villiers* v. *Villiers* (*e*), *Thurston* v. *Delahay* (*g*), *Pr chard* v. *Symonds* (*h*), *The King* v. *Castleton* (*i*), *Doxon Haigh* (*k*), *Liebman* v. *Pooley* (*l*), *Stark. Evid.* Part 350. 354. (first ed.) [*Erskine* J. referred to the ca of *Brown* v. *Woodman* (*m*)] A rule nisi being grante

Bompas Serjt. now shewed cause. The existence a counterpart furnishes no ground for rejecting pa evidence of the contents of the original deed. Th are no degrees of secondary evidence. This rule, l down by *Parke* J. in *Brown* v. *Woodman*, was expres recognised in *Doe dem. Gilbert* v. *Ross.* (*n*) [*T*

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to him" (the donor) "*Et non allocatur*; for, it was said, both parts of the indenture, after the entail determined, belong to the donor; *for both parts are but one deed in law*, and the deed belongs more readily (*pluis hasty*) to him than to any other stranger who has nothing to do therewith."

(*a*) 1 *Man. & Ryl.* 297. (*b*).
(*b*) *Vide post*, 249 (*b*).
(*c*) *Caldecott's Cases*, 452.
(*d*) *Obiter.*
(*e*) 2 *Atkyns*, 71.
(*g*) *Bull. N. P.* 254.
(*h*) *Ibid.*
(*i*) 6 *T. R.* 236.
(*k*) 1 *Esp. N. P. C.* 40
(*l*) 1 *Stark. N. P. C.* 16
(*m*) 6 *Carr. & P.* 206. P
J. "There are no degree secondary evidence. If t had been a *duplicate origi* it might have been differe As to counterparts and du cate originals, see *antè*, Vol. 518. (*b*).
(*n*) 7 *M. & W.* 102. that case, the shorthand wri

dal C. J. After that case it is difficult to say that the application for a new trial is not answered. (*a*)]

The more important point is, whether the lessor is not entitled to the possession of the indenture of lease when the demise is determined either by effluxion of time or by a forfeiture. In *Rawlins*'s case (*b*) Lord *Coke* observes, that "it was adjudged in the Common Pleas, in the case of one *London* (*c*), that if a man take a lease for years by deed indented, of his own land, it is no conclusion but during the term; and after the end of the term, the lessor may enter or occupy the land; for, by the determination of the term, the estoppel is also determined; *and then both the parts of the indenture belong to the lessor;* as it is held, 38 *H.* 6. 24."

The proper custody of an expired lease, is the muniment chest of the lessor; *Plaxton* v. *Dare*. (*d*) [*Tindal* C. J. It is, no doubt, a *proper* custody. *Maule* J. An expired indenture of apprenticeship sometimes remains with the master, sometimes with the apprentice. (*e*) *Erskine* J. Suppose a search to be made among the muniments of the lessor, and none amongst the muniments of the lessee, would that be sufficient to let in secondary evidence? That would be a good test. *Maule* J. Suppose the lessee destroys the lease, would the landlord have a right of action?] It is submitted that he would. (*g*) On the other hand, if the lease were

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notes of a deed read in court were received in evidence, though an *attested copy* was in existence; and the court of Exchequer refused to grant a rule nisi for a new trial upon this objection.

(*a*) *Vide tamen* as to counterparts. *Burleigh* v. *Stibbs*, 5 *T. R.* 465.; *Roe* v. *Davis*, 7 *East*, 363.; *Paul* v. *Meek*, 2 *Y. & J.* 116.

(*b*) 4 *Co. Rep.* 52 *a.* 54 *a.*

(*c*) *London* v. *James*, 1 *Anderson*, 128.; *James's* case, *Sir F. Moore*, 181.; 2 *Roll. Abr.* 871., 10 *Vin. Abr.* 460.

(*d*) 10 *B. & C.* 17., 5 *Mann. & R.* 1.

(*e*) The latter appears to have the greater interest in its preservation.

(*g*) *Vide post*, 251 (*a*).

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to remain outstanding, it might be used against the less
when the evidence necessary to justify the re-entry
the ground of forfeiture was lost. In *Com. Dig.* t
Charters (B. 1.), it is said, "that a man may have detin
for any charters which make his title sure;" for whi
is cited *F. N. B.* 138. K. (*a*) [*Maule* J. In the case
a conveyance by lease and release, the party conveyi
would, according to you, be entitled to the lease fo
year after the year was expired.] The relessee or
assignee would, it is conceived, be entitled to the p
session of the lease for a year. Thus it is said in *F.*
B. 138. K., "If a man make a lease for years, a
afterwards confirm his estate in fee, the heir of t
feoffee shall have the deed for the lease for a year
well as the deed of confirmation, because that the de
(of lease) doth make the confirmation good." (*b*)

Atcherley Serjt. in support of the rule. The
fendant is entitled to have a nonsuit entered. Wh
the lessor has regained the possession, he or his he
may maintain trover against a mere wrongdoer, w
withholds muniments which relate to the inheritan
but he is not entitled to treat the detention of an
pired lease by the lessee, as a wrongful act (*c*); *à fortio*
where the determination of the lease is supposed

(*a*) This is given as the result of several cases put in fo. 138. F., G., H., I., and K.

(*b*) If *A.*, seised in fee, bargains and sells his land for a year, or otherwise, to *B.*, *A.*, at common law, would remain seised in fee *in possession* as before, though, to the extent of the interest bargained and sold, *A.* would be seised to the use of, that is, in trust for, *B.* The statute of uses executes *B.*'s interest, giving him a legal estate to the extent of that terest, but it does not tran the *deed* of bargain and sale which the interest was crea Neither *B.*, nor any pe claiming under *B.*, is, th fore, bound to make *profer* that deed. When — as it usu happens within a few seco — *A.* executes the deed of *lease pur enlarger l'estate*, term of one year is extinguis in the reversion in fee.

(*c*) *Vide post*, 254 (*a*).

result from a forfeiture. When does the right of the lessor to the possession of the lease arise? The lessor has stronger evidence of title by possession of the counterpart, which is executed by the party in the actual and notorious occupation of the property, than by the possession of the original executed by himself. Surely the lessor is not entitled to say to the lessee, "You have committed a forfeiture by breach of covenant, and now I claim the indenture of lease." May not there be a title in the lessee to a cross remedy by action, for breach of covenant, against the lessor? and is he to be deprived of the possession of the only document by which he can assert that title? The court, on a former occasion, asked what is the practice of courts of equity. It has been stated by a person of high authority in such matters, that the court of Chancery will not compel the delivering up of an executed lease, unless all accounts are cleared, and nothing remains to be done, and the lessee can shew no good reason for withholding it. If the lessor had any occasion to enforce any of the provisions of the lease against the lessee, he could not avail himself of the original lease without notice to produce the counterpart. In the case cited from the *Year-Book* in *Rawlins's* case, the question as to the right to the possession of the deed was between the heir and the executor (*a*); and, as between them, the heir was held to have the better title.

Enough was not proved to make out a forfeiture. It was necessary to shew a power of re-entry for breach of covenant. *Stark. Evid.* part ii. 353. (*b*) *The King*

(*a*) The action was brought by the heir of the donor; the defence set up was, that the right of possession was in the executor *of the donee*. The court held that the right of possession was in the representative, not of the party who had taken, but of the party who had granted the determined estate.

(*b*) 1st edit.

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v. *Castleton.* There is no case in which the counte part has been considered secondary evidence. [*Ti dal* C. J. It is laid down as broadly as possible in *D dem. Gilbert* v. *Ross.* (*a*)] The original counterparts a mentioned in that case; the judgment of the cou applies only to the general question, as to the existen of any degree in secondary evidence. The counte part is, by the agreement of the parties, *quasi* prima evidence. In *Brown* v. *Woodman*, *Parke* J. said, " there had been a duplicate original it might have be different." [*Tindal* C. J. In that case both dee would have been originals.] In *Villiers* v. *Villiers* (I it was said by Lord *Hardwicke* C. " If an origin deed is lost, the counterpart may be read; and if the is no counterpart forthcoming, then a copy may be a mitted. [*Erskine* J. Can you read a counterpart wit out notice to produce the original? I do not expre any opinion on the point; but it is a *test.*] In *Gi ley* v. *Bishop of Exeter* (*c*), the former owner of an a vowson was alleged to have granted the then ne presentation, which grant was put in issue by one the defendant's pleas in *quare impedit;* the original de of grant not being found annexed, as usual, to t presentation, it was held, that the proper custody w amongst the muniments of the party now seised of t advowson; and a counterpart, purporting to be enter by the grantee, was held to be admissible as seconda evidence of the grant, without proving a search among the papers of the personal representative of the grant In *Doxon* v. *Haigh* the copy of a deed was given evidence by the plaintiff; but it was shewn not on that one part of the deed was in the possession of t defendant, but also that the other parts were inacc sible to the plaintiff.

(*a*) *Antè*, 246 (*m*), 247 (*n*).
(*b*) 2 *Atk.* 72.
(*c*) 1 *Mann. & Ryl.* 298 n.

And see *Brewster* v. *Sewell*, *B. & Ald.* 296.

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The secondary evidence given in this case, supposing it to have been properly admitted, was insufficient to establish the title of the lessor of the plaintiff. If the question had arisen upon the trial of an action of ejectment for a forfeiture, it would not have been sufficient for a witness to say, that he inferred, from the course of his own practice, that the lease reserved a power of re-entry for breach of covenant.

The recovery in ejectment against the casual ejector, was not evidence, that a forfeiture had been incurred.

For the defendant, therefore, it is submitted, first, that it has not been shewn that an action of trover will lie for a lease. (*a*) Secondly, that there are covenants outstanding which may render the possession of the lease absolutely necessary for the lessee. (*b*) And, thirdly, that no connection has been shewn between the recovery against the casual ejector and the supposed for-

(*a*) The proper remedy for a party from whom deeds relating to his freehold, are withheld, is, an action of detinue for charters, which, for such deeds, can be brought only in this court. *Com. Dig.* tit. *Charters*, (B. 2.) And see *M.* 3 *E.* 4, fo. 14. *a.* If the plaintiff declares upon his title, his possession, though it be alleged, appears to be neither material nor traversable; property and right of possession, without actual possession, being sufficient to maintain the action.

Quære, whether in the case of an absolute and irremediable conversion by destruction of the instrument, trover would not lie. It is true that, in detinue, it is no answer to the *adhuc detinet*, that the article bailed, or found, has been destroyed; but it seems to be unreasonable, when such destruction is known to have taken place, to compel the plaintiff to declare, contrary to the truth, upon, what may be called, a *continuing detention by estoppel*.

(*b*) It was assumed throughout the discussion, that in the lease were covenants to be performed on the part of the lessor; and if the attorney who prepared the draft had been examined as to this point, he would, in all probability, have established it by general evidence, such as he gave with respect to the clause of re-entry. In the absence of any express covenant, an action would lie for an ouster during the term, upon the covenant in law raised by the word *dimisit*.

There can be little doubt but that any breach of covenant on the part of the lessor

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feiture. The wisdom of the rule laid down by Lo *Hardwicke* C. is obvious; and it applies most strong to the present case.

TINDAL C. J. now delivered the judgment of t court.

This was an action of trover, for an indenture lease; to which the defendant pleaded that the plaint was not possessed. At the trial, before my broth *Coltman*, it appeared that the lease in question had be granted for a term not yet expired, by the plaintiff one *Spratley* who had executed a counterpart, and th the defendant held the lease by delivery from *Spratl* the lessee. The plaintiff grounded his claim to t indenture of lease, upon a forfeiture of the lease, breach of condition on the part of the lessee; and afi notice to the defendant to produce the lease, he ga parol evidence of its contents; and having obtained verdict, a rule nisi was granted, either for a new tri on the ground of the inadmissibility of the evidence, for a nonsuit, on the ground that the action could n be maintained.

It will be unnecessary to consider the former part the rule (*a*), as we are of opinion that the defendant entitled to make the rule absolute for a nonsuit.

The instrument for which this action is brought, w executed by the plaintiff for the use and security of t lessee, and was delivered to him absolutely; the less at the same time, executing and delivering, in like ma ner, a counterpart to the plaintiff. The *primâ fa* inference to be drawn from this state of facts, is, th the property in the indenture of lease belongs to t

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would, until the damages arising therefrom had been satisfied or had passed *in rem judicatam*, be a good answer to a decla tion in detinue.

(*a*) *Vide antè*, 242 (*c*). 247 (

lessee, and, in the counterpart, to the lessor. Now it is impossible to fix upon any precise point at which the lessee's property in the indenture of lease, or the right of the lessee to keep the indenture of lease, ceases by law, unless it be the time when the term, created by the lease, comes to an end, either by efflux of time or by forfeiture. (*a*) And, as it was admitted in the course of the argument, that the right of the lessee to hold the indenture of lease, does not cease immediately on the expiration of the term, as he still may have occasion to use it in an action of covenant against his lessor, so also the same necessity for keeping the lease, for a time at least, may equally exist when the lease expires by forfeiture. On the part of the plaintiff no case was cited in which such an action as the present had ever been maintained; but the case of *Plaxton* v. *Dare* (*b*) was mentioned, in which expired leases produced from the custody of the lessor, were admitted in evidence; and a passage in *Fitzherbert's Natura Brevium*, 138., and the *Year-book* of 38 *H.* 6. 24. were also referred to. The case of *Plaxton* v. *Dare* only shews that the custody of the lessor is a custody in which expired leases may be properly found according to the usual course, not that a lessor has a right to claim such a lease from the lessee; and the dictum of *Buller* J. in *The King* v. *North Bedburn* (*c*), shews, that, in the opinion of that learned judge, the custody of the lessee would be at least as proper as that of the lessor. The passage in *F. N. B.* 138. appears to be founded upon the *Year-Book* of 38 *H.* 6. 24., in which it was held, that the son of a person who had granted an estate tail by indenture, — the tenant in tail having died without issue, — might maintain detinue of charters against a

(*a*) *Vide antè*, 251. n., 252. *n.*

(*b*) 10 *B. & C.* 17., 5 *Man. & R.* 1.

(*c*) *Cald. Cas.* 452. And see *Keilwey*, 110 *b. pl.* 35.; *Litt. s.* 370.; *Co. Litt.* 229.

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stranger who became possessed, by finding, of that part of the indenture which had been delivered to the grantee in tail. But this decision proves no more than this, that the circumstance of the estate which was granted by the deed having expired, forms no objection against the grantor's right to recover it in an action of detinue of charters against a stranger, as a deed relating to his inheritance, and by no means shews that he could recover it against a person claiming under (*a*) the grantee.

On the whole, therefore, we think that the rule for a nonsuit ought to be made absolute.

Rule absolute.

(*a*) *Vide antè*, 242 (*c*). 247 (*a*).

April 22.

HOWARD *v.* SMITH.

Upon an issue on the tenancy in replevin, the verbal statements of the plaintiff as to the terms of his tenancy are admissible in evidence, although the tenancy was created by adopting the terms of a former demise in writing.

REPLEVIN. The defendant made cognizance as bailiff to *J. Micklethwaite*, under a demise to the plaintiff at the rent of 20*l.* payable quarterly. Plea: *non tenuit, modo et formâ*; on which issue was joined.

At the trial before *Bosanquet* J. at the sittings at *Westminster*, in *Trinity* term 1840, the preceding tenant proved a verbal agreement between the plaintiff and *J. Micklethwaite*, that the plaintiff should hold on the same terms as the witness had held; but those terms were not mentioned in the presence of the witness. It appeared, on cross-examination, that the witness had held under a written agreement; and it was objected that the terms of that holding could not be proved without producing, or accounting for the non-production of, such written agreement. It was then shewn that the plaintiff had stated, that he had paid 3*l.* towards his *quarter's* rent due at *Michaelmas*; and that he had said to a neighbour, "I don't know why you should pay only 18*l.* a year,

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when I pay 20*l.*" The learned judge ruled that the evidence was sufficient to support the cognizance, and he directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for 4*l.* 4*s.*, the cost of the replevin bond.

In *Michaelmas* term last, *Bompas* Serjt. moved to enter a verdict according to the leave reserved, on the ground that the affirmative of the issue had not been proved; or for a new trial, on the ground that parol evidence of the terms of the demise had been improperly admitted. Though it has been held that the existence of a tenancy between the parties may be shewn by parol, the demise being in writing; *Rex* v. *Holy Trinity, Hull* (*a*); the *terms* of that demise cannot be proved without producing the written instrument; *Doe* v. *Harvey.* (*b*) A rule nisi having been granted,

Channell Serjt. in *Easter* term last, shewed cause. The defendant can afford to strike out the whole of the evidence given by the first witness, the statement made by the plaintiff as to his holding at a rent of 20*l.*, and as to his having paid a *quarter's* rent, being sufficient to maintain the issue. (*c*) But the evidence of the former tenant was admissible. It is sufficient if parties agree to be bound by the terms of a written contract, though such contract may, *per se*, be void for want of signature. Suppose parties direct the terms of their agreement to be taken down, the agreement may be proved by parol, without producing the minutes which have been so taken down. If a lessee hold over, the terms of the implied tenancy which arises, may, it is submitted, be proved,

(*a*) 7 *B.* & *C.* 611., 1 *Man.* & *Ryl.* 444.

(*b*) 8 *Bingh.* 239., 1 *Mo.* & *Scott*, 374.; and see *Rex* v. *Merthyr Tidvil*, 1 *B.* & *Ad.* 29.; *Rex* v. *Hunt*, 3 *B.* & *Ald.* 566.; *antè*, 50.

(*c*) See Vol. I. 358 (*b*).

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without producing the written demise under which held during the term. (*a*)

Bompas Serjt. *contrà*. Where a tenant holds und written instrument, the terms of the tenancy cannot proved by parol, — even though the parol testimony tendered, in an action to which the tenant is a party as the *impression left on the mind* of the witness by st ments made by the tenant. [*Erskine* J. What objec can there be to the reception of the tenant's own st ments against himself?] The danger of misrepresenta or mistake is the same as it would be if the witness st the *impression left on his mind* from having read a wri document. [*Tindal* C. J. *Slatterie* v. *Pooley* in the chequer (*b*) is an authority against you.] In a late from the western circuit (*c*), the court avoided de ing the point now raised. An implied contract not be set up where there is evidence of an exp contract. [*Bosanquet* J. You do not deny that evidence to which you object, would be admissible the purpose of shewing the existence of the relatio landlord and tenant.] That is an exception from general rule; and it is the only exception whic allowed. In *Strother* v. *Barr* (*d*), which was an ac brought by *A.* for an injury done to the reversion, court was equally divided upon the question, whet where the occupier holds under a written agreem evidence that he holds as tenant to *A.* is sufficien shew that the reversion is in *A.*

TINDAL C. J., now delivered the judgment of court.

This case, which, as well as that of *Bethell* v. *B cowe* (*e*), involves a question on the admissibility

(*a*) *Quære.*
(*b*) 6 *M.* & *W.* 664.
(*c*) Not reported.
(*d*) 5 *Bingh.* 136.
(*e*) *Antè*, 119.

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evidence offered to prove the terms of a tenancy, has stood over for the consideration of the court. It was an action of replevin, in which the defendant, as bailiff of one *Micklethwaite*, acknowledged the taking as a distress for rent due from the plaintiff as tenant to *Micklethwaite* at 20*l.* per annum, payable quarterly, and in which the plaintiff pleaded *non tenuit modo et formâ.*

The premises in question had been before held under a written agreement by a person who was called as a witness, and who stated that the plaintiff, in a conversation with him, had expressed his willingness to take the premises upon the same terms as those upon which he, the witness, had held them. Whereupon they went together to *Micklethwaite*, who agreed that the plaintiff should have them on the same terms. The written agreement was mentioned in the conversation between the witness and the plaintiff, but it was not produced, either on the occasion of that conversation or at the time of the conversation with *Micklethwaite.* Another witness was called, who proved that the plaintiff had stated to him that he held the premises at 20*l.* a year: and it was further proved that the plaintiff had said that he had gone to *Micklethwaite* and had paid him 3*l.* towards the quarter's rent due on the 29th of *September.*

It was objected that after what had passed with the former tenant respecting this written agreement, these declarations were not receivable in proof of the terms on which the premises were held by the plaintiff, for the purpose of shewing either the amount of the rent, or that it was payable quarterly. But we are of opinion that the statements made by the plaintiff himself of the terms upon which he was actually holding the premises, were admissible against him, notwithstanding what had passed respecting the written agreement under which the former tenant had held; and that the present case must be governed by the law as laid down in *Slatterie* v. *Pooley.*

Rule discharged.

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June 7. ROBERT BELL, one of the Public Officers the National Provincial Bank of ENGLAND ROGER BANKS and WILLIAM HOWDEN, t Younger.

A promissory note is made by *A.* and *B.*, payable to *C.*, to secure advances from *C.* to *A.* After the note becomes due, it is agreed between *C.* and *A.*, without the privity of *B.*, that *A.* shall execute a warrant of attorney to *D.*, as trustee for *C.*, to secure the amount of the note and a further advance made by *C.* to *A.*

Held, that the note is not merged in the warrant of attorney.

Held also, that the acceptance of the new security by *C.*, unaccompanied by any binding engagement on his part, to give time to *A.*, does not discharge *B.*

ASSUMPSIT, by the indorsees, against the jo makers, of a promissory note for 250*l.*, paya one month after date to the order of, and indorsed *William Mann*, the clerk and manager of the bank.

The defendant *Howden* pleaded, that he made, sign and delivered the note at the request of the said fendant *Banks*, and as a mere surety for *Banks*, and a better security to the co-partnership for the due p ment to them of the said sum of money in the dec ation specified, and not for and on account of any ot matter whatsoever; of all which premises the *William Mann* and the said co-partnership, at the t of the making and delivering of the note, and at the t of the indorsement of the same, had full and due kn ledge and notice. And, further, that after the became and was due and unpaid in the hands of co-partnership, and before the commencement of suit, to wit, on the 18th day of *January* 1841, it agreed by and between the co-partnership, then b the holders of the note, and the defendant *Banks*, w out the consent, leave, or licence of the defen *Howden*, that the defendant *Banks* should, at the req of and for and on account of the co-partnership, for the purpose therein-after mentioned, make, exec and deliver to certain persons, to wit, *J. M.*, *J. R.*, *W. H.*, then being three of the trustees, acting for on behalf of the co-partnership, a certain instru

called a warrant of attorney, to confess judgment, as thereinafter mentioned, to be subject to a defeasance thereunder written as thereinafter also mentioned. And that in pursuance of such agreement, the defendant *Banks* did, afterwards and before the commencement of the suit, and whilst the note was due and unpaid as aforesaid, to wit, on the day and year last aforesaid, at the request of the co-partnership, in pursuance of such agreement as aforesaid, and without the consent of the defendant, *Howden*, sign, seal, and, as his act and deed, deliver to the said *J. M.*, *J. R.*, and *W. H.*, so being such trustees as aforesaid, and for and on account of the co-partnership, a certain warrant of attorney to confess judgment, bearing date, to wit, on the said 13th day of *January* 1841, directed to certain persons therein named, as, and then being, attorneys of Her Majesty's court of Queen's Bench at *Westminster*, jointly and severally, or to any other attorney of the same court, and thereby empowered them, or any of them, or any other attorney as aforesaid, to appear for the defendant *Banks*, in Her Majesty's court of Queen's Bench at *Westminster*, at any time, and then and there receive a declaration for the defendant *Banks*, in an action of debt for 750*l.*, (of which sum of 750*l.*, the said sum of 250*l.* in the note mentioned, was part and parcel,) at the suit of the said *J. M.*, *J. R.*, and *W. H.*, their executors and administrators, and thereupon to confess the said action, or else to suffer judgment by *nil dicit*, or otherwise, to pass against the defendant *Banks* in the said action, and to be thereupon forthwith entered up against the defendant *Banks*, of record, in the said court, for the said sum of 750*l.*, besides costs of suit; which warrant of attorney was and is subject to a defeasance thereunder written, whereby it was and is declared that the said warrant of attorney was to secure the repayment by the defendant *Banks*, of a certain sum of 375*l.* with

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lawful interest, (of which last-mentioned sum, the sum of 250*l.* in the note mentioned, was part parcel,) to the said *J. M.*, *J. R.*, and *W. H.*; and it thereby agreed and declared, by the said parties, judgment might be immediately entered up, and execution might forthwith issue thereon for the sum of 375*l.* and interest as aforesaid, together costs of judgment and execution, sheriff's pound officers' fees, and all other incidental expenses. further, that the defendant *Banks* did then, at th quest of the co-partnership, deliver to the said *J. J. R.*, and *W. H.*, as such trustees as aforesaid, for and on account of the co-partnership, the warrant of attorney so executed by the defendant *B* as aforesaid, in full satisfaction and discharge of al principal money and interest, which, at the time o execution and delivery of the said warrant of attor were due upon the note in the said declaration mentio and which warrant of attorney, the said *J. M.*, *J. R.*, *W. H.*, as such trustees as aforesaid, then accepted received, for and on account of the co-partnership, of from the defendant *Banks*, in such full satisfaction discharge as aforesaid; and further, that the said in ment, called a warrant of attorney to confess judgm so being executed, delivered, and accepted, in ma and on the occasion aforesaid, the said *J. M.*, *J. R.*, *W. H.* afterwards, to wit, on the 20th day of *Jan* A.D. 1841, caused the said judgment to be entered t record in the said court of Queen's Bench at *minster*, against the defendant *Banks*, as of *Hilary* in the year last aforesaid, for the said sum of 750 also for 70*s.* which were awarded to the said *J. M.*, and *W. H.* in and by the said court of Queen's Be for their damages by them sustained, as well on occa of the detention of the said debt as for their costs charges by them about their suit in that behalf pended — *prout patet per recordum.* And, further,

the said judgment still remains in full force and effect, not reversed, or in any way made void. Verification, and prayer of judgment.

Replication, that the defendant *Banks* did not deliver to the said *J. M.*, *J. R.*, and *W. H.*, for or on account of the co-partnership, the said warrant of attorney in that plea mentioned, in such full satisfaction and discharge as in that plea mentioned; nor did the said *J. M.*, *J. R.*, and *W. H.* accept and receive the said warrant of attorney for and on account of the co-partnership, of and from the defendant *Banks*, in such full satisfaction and discharge, *modo et formâ*; concluding to the country.

The defendant *Banks* suffered judgment by default.

At the trial before *Bosanquet* J. at the sittings at *Guildhall* in this term, the defendant *Howden*, upon whom the issue lay, called the defendant *Banks* as a witness. The admissibility of *Banks* was resisted by *Bompas* Serjt. and *Crompton*, for the plaintiff, on the ground that he being sued as a joint-contractor with the defendant *Howden*, was an incompetent witness to negative the contract; and 1 *Phillipps, Evid.* 68.(*a*), *Ward* v. *Haydon* (*b*), *Brown* v. *Brown* (*c*), and *Green* v. *Sutton* (*d*) were cited in support of the objection. *Worrall* v. *Jones* (*e*) was distinguished on the ground that in that case there was no liability over to contribution. The learned judge rejected the witness, observing that this was an action of contract, and not of tort; that the note was joint; and that unless the plaintiff recovered against both, he could not recover against either, and that the jury were im-

(*a*) 5th edition.

(*b*) 2 *Esp. N. P. C.* 552.

(*c*) 4 *Taunt.* 752., where it was held that even the plaintiff could not *call* a defendant who had suffered judgment by default; but this case appears to be directly overruled by *Worrall* v. *Jones*, 7 *Bingh.* 395., 5 *M. & P.* 241. In *Brown* v. *Fox*, 1 *Phill. Ev.* 5th ed. 75., the very point appears to have been decided by Lord *Kenyon*. And see *Hall* v. *Curzon*, 9 *B. & C.* 646., 4 *N. & M.* 565.

(*d*) 2 *Moo. & Rob.* 269.

(*e*) 7 *Bingh.* 395., 5 *M. & P.* 251.

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pannelled to try the liability of the defendant who h pleaded, and to assess damages against the party wh it was sought to examine as a witness.

Mann, the manager and clerk of the National P vincial Bank of *England*, being called to prove the c racter of the arrangement between *Banks* and the co pany, the warrant of attorney was put into his han and he was asked whether that was the security giv It was objected that the warrant of attorney could be used without calling the attesting witness. T learned judge said that it was a question of great nic whether the warrant of attorney was or was not mitted by the pleadings (*a*), and that he should rece the evidence, giving the plaintiff leave to move. A v dict having been returned for the plaintiff,

Goulburn Serjt. (with whom was *Webster*) now mo for a rule to shew cause why judgment should not arrested (*b*); or why there should not be a new trial misdirection, on the ground that the judge should h directed the jury to find that, on the facts admitted the record, the plaintiffs had no cause of action.

The principal point is, in arrest of judgment. T defendant *Howden* appears by the record to be charged in two ways. The lesser security merged the greater; and by taking the latter security, both parties to the former security were discharged. Ag when the creditor takes a new security from the pr cipal debtor, he discharges the surety. It is clear, t where an arrangement is entered into between the c ditor and the debtor behind the back of the surety,

(*a*) The traverse of the delivery and acceptance of *the said* warrant of attorney in satisfaction, does not appear to involve a denial of the preceding substantive and distinct allegation of the *making* of such warrant of attorney.

(*b*) Where a verdict is fo for the plaintiff upon an i taken by a bad replication good bar, the defendant is titled, not merely to *arrest* judgment, but to have ju ment entered for himself, *obstante veredicto.*

surety is discharged, if there be the possibility of his being injured by the arrangement. Here, it appears by the plea, that a week was given to *Banks*. [*Maule* J. That is laid under a videlicet.] A videlicet does not make an allegation immaterial, which, in the absence of a videlicet, would be material. [*Maule* J. If the allegation were without a videlicet, the proof might be of nineteen or twenty-one days, although twenty were mentioned in the pleading.] In *Glendenning, exparte* (*a*), a deed of compromise with the principal debtor was held to discharge the surety. It is sufficient if he *might* have been prejudiced. The judgment of *Richards* C. B. in *Bowmaker* v. *Moore* (*b*) is very clear and explicit. *Boultbee* v. *Stubbs*. (*c*)

There was a merger of the original debt. [*Maule* J. The difficulty is, that it is between different parties.] The warrant of attorney, though not given to the plaintiffs themselves, was given to other persons in trust for them. In *Siddall* v. *Rancliffe* (*d*) the payee of a promissory note, expressed to be payable on demand, but given in respect of a sum payable by instalments, having sued the maker, took a cognovit, stating the debt to be the amount of the instalments then due; and though no judgment was entered up, it was held that the payee's right of action on the note was destroyed by the cognovit; *Nicholson* v. *Revill* (*e*), *Cheetham* v. *Ward*. (*g*) [*Maule* J. Have you any case in which a judgment in favour of trustees, created a merger of a right of action vested in cestui que trust? Judgments are usually so confessed for the purpose of *preventing* a merger.] Unless the principal had been insolvent, he would not have entered into such an arrangement as that which took place here.

(*a*) *Buck*, 517.

(*b*) 7 *Price*, 223., *S. C.* 1 *Dowl.* 264.

(*c*) 18 *Ves.* 20. And see 5 *Mann. & R.* 292. (*a*), 6 *Nev. & M.* 196. (*a*), 439.

(*d*) 3 *Tyrwh.* 441., 1 *Cro. & M.* 487.

(*e*) 4 *A. & E.* 675., 6 *N. & M.* 192.

(*g*) 1 *Bos. & Pull.* 630.

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TINDAL C. J. This application is made upon tw grounds; first, that this being an action on a promi sory note, against principal and surety, there has bee such a dealing between the plaintiff and the princip debtor, as to deprive the former of his remedy again the surety on the note; secondly, that a judgment h been obtained, and that such judgment operates as extinguishment of the joint debt.

It appears to me that there is no ground for either these positions.

No doubt a surety is discharged by any act of t creditor by which he is placed in a worse situatio Such an alteration amounts, in fact, to a legal frau The surety would suppose that when the day payment arrived, payment would be made, or that should be in a position entitling him to enforce pa ment. Giving time means enlarging the time for pa ment of the original debt. Here, no time has be given. Although before the promissory note becam due the original debtor gave the additional security o warrant of attorney, there was no stipulation for fu ther time. A mere *forbearance* on the part of the c ditor to enforce his remedy against the principal debt is not a giving of time so as to discharge the sure *Twopenny* v. *Young* (*a*) appears to me to dispose of t first ground upon which this application is made. that case it was expressly stipulated in the deed execut by the principal debtor, containing a bill of sale to creditor, that three days' notice should be given bef the bill of sale should be enforced. It was held t this deed did not extinguish or suspend the reme against the surety. That case seems to me to put end to the question first raised.

The second question is, whether the joint debt *Banks* and *Howden* was extinguished by the new

(*a*) 3 *B.* & *C.* 208., 5 *D.* & *R.* 259.

curity taken from the former. *Drake* v. *Mitchell* (*a*) appears to me to dispose of that question. In that case one of three joint covenantors gave a promissory note and a bill of exchange for part of the rent secured by the covenant, and judgment was recovered in an action on the note and bill. This judgment was held to be no bar to an action on the covenant; the note and bill, though pleaded to have been drawn for the payment and in satisfaction of such part of the rent, not being averred to have been *accepted* by the plaintiff in satisfaction, or to have *produced* satisfaction. Lord *Ellenborough* says, "I have always understood the principle of *transit in rem judicatam*, to relate only to the particular cause of action, in which the judgment is recovered; operating as a change of remedy, from its being of a higher nature than before. But a judgment recovered, in any form of action, is still but a security for the original cause of action until it be made productive, in satisfaction, to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have. If, indeed, one who is indebted upon simple contract, give a bond or have judgment against him upon it, the simple contract is merged in the higher security. So one may agree to accept of a different security in satisfaction of his debt; but it is not stated here that the note and bill were accepted in satisfaction; and in themselves they cannot operate as such until the party has received the fruits of them." Here, the jury have negatived the delivery and acceptance of the warrant of attorney in satisfaction of the principal and interest due upon the note. I therefore think that no rule should be granted.

COLTMAN J. I am of the same opinion. It is not a sufficient ground for discharging the surety that the

(*a*) 3 *East*, 251.

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principal has taken a further security from the princip debtor without the privity of the surety, although h may be thereby induced to forbear from enforcing hi demand against the principal. Here, the creditor ha not fettered himself in any way. The warrant of a torney is no satisfaction. If, indeed, the parties wer to proceed to execution upon the judgment entered u under the warrant of attorney, the original debt woul to the extent of the sum obtained under an execution, b discharged. A merger can only take place between th same parties. As my brother *Maule* has observed, sec rities of this description are frequently taken in the nam of trustees for the very purpose of preventing a merge

It is not necessary to consider whether the sure would be entitled to any relief in equity.

ERSKINE J. I am of the same opinion. All t cases which have been cited shew, that the rule is, th the surety is not discharged unless he is placed in worse situation by the indulgence which the credit engages to extend to the principal debtor. In the ca of giving time, the surety *may* be prejudiced, becau he may be deprived of the power of immediately sui the principal debtor. What is there here that, by a possibility, can place the surety in a worse situatio Where there is an agreement to give time beyond t period at which the debt would otherwise have be demandable, the surety might be in a worse situatio Here, a power is reserved of issuing execution imm diately. Had it even distinctly appeared that delay h taken place in enforcing payment from the princip debtor, such forbearance would not have affected t rights of the parties.

This is not a case of merger, because no higher s curity has been taken between the *same* parties; a the case of *Drake* v. *Mitchell* shews that this warrant

attorney, not being taken in the same action, will not discharge this cause of action.

MAULE J. I am of the same opinion. No time has been given to the principal debtor. The plaintiff has, at all times, been at liberty to exercise the same rights of action against the principal debtor which he originally possessed. Here, instead of time being given, time has been taken away. It has been held, even in equity, that the surety is not discharged if the time given is not greater than that which the debtor would have been otherwise entitled to. It is said that the creditor must have known that the principal was insolvent from the very fact of his entering into this arrangement. No authority has been cited to shew that this would be a ground of discharge. With reference to the discharge of sureties it is well known in law, that giving time means the putting it out of the power of the creditor to sue during the extended time.

A merger takes place where a security of a higher nature is given by the same parties. It may be that the taking a security of a higher nature from one of two joint debtors would cause a merger. Here, the merger fails in two respects, and it is a point quite collateral to the justice of the case. It is not, in form, *the same demand*, and the warrant of attorney is given to confess a judgment *to other parties*. It is said that those parties are merely *trustees* for the plaintiffs. It cannot be so understood in a court of law. Trustees are persons who hold property with some duty attached. But it is quite enough for this purpose, that they are not the same parties. In practice, it is well known, trustees are frequently introduced for the purpose of avoiding the very difficulty now attempted to be raised.

Rule refused. (*a*)

(*a*) *Vide Holmes* v. *Bell*, *antè*, 231. 238. (*a*).

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ALCOCK *v.* ALCOCK.

The maker of a promissory note, sued by an indorsee, was allowed to plead that the indorser was a lunatic at the time of the indorsement.

ASSUMPSIT. The first count of the declaratio was upon a promissory note for 20*l.*, dated th 20th of *September* 1833, made by the defendant, payab to *Edward Craston* or order, at three months' date, an by *Craston* indorsed to the plaintiff.

The second, third, and fourth counts were, upo other notes of different dates, made and indorsed as th first.

The fifth count was for 200*l.* upon an account state

The defendant, under a rule founded upon an ord of *Bosanquet* J., pleaded, 1st, to the first and secon counts, *actio non accrevit infra sex annos.* 2dly, to th first count, that *Craston* did not indorse. 3dly, the first count, payment to *Craston* after the no became due, and whilst he was the holder there 4thly, 5thly, and 6thly, to the second, third, and four counts, that *Craston* did not indorse. 7thly, to th second, third, and fourth counts, payment to *Crast* after the notes became due, and whilst he was the hold thereof. 8thly, to the second, third, and fourth count accord and satisfaction by payment of part, and givi promissory notes drawn by the defendant and indors by *E. A. Butler* as his surety for other part of th amount of the notes, to *Craston*, after the notes becam due, and whilst he was the holder thereof. 9thly, the fifth count, non assumpsit.

The plaintiff added the *similiter* to the second, fourt fifth, sixth, and ninth pleas, and took issue upon th plea of the statute of limitations, the pleas of paymen and the plea of accord and satisfaction; upon which r plications the defendant joined issue. A summons w

taken out, calling upon the plaintiff to shew cause why the rule to plead several matters should not be amended by adding a plea, to the first, second, third, and fourth counts, that *Craston* was a lunatic at the time he indorsed the notes in those counts mentioned, and that there was no consideration for those indorsements; and by substituting for the third plea, a plea of payment of the sum of 20*l.*, parcel of the damage sustained by reason of the breach and promise in the first count mentioned, to *Craston* after the said note became due, and whilst he was the owner thereof; and by substituting for the eighth plea, a plea to the second, third, and fourth counts, of accord and satisfaction, by payment of part, and the giving of promissory notes drawn by the defendant, and indorsed by *E. A. Butler*, as his surety, for other part, of the amount of the notes in those counts mentioned, to *Craston* after the said notes became due, and whilst he was the holder thereof, and extending the same plea to 5*s.* 9*d.*, parcel of the damages sustained by reason of the non-performance by the defendant of his promise in the first count mentioned.

The summons being attended before *Alderson* B., that learned judge allowed the second and third amendments prayed; but rejected the first amendment, on the ground that the lunacy of *Craston* could not be set up as a defence to this action.

Stephen Serjt., in *Easter* term last, moved for a rule calling upon the plaintiff to shew cause why the defendant should not be at liberty to add the plea rejected by *Alderson* B. The fact of *Craston*'s lunacy came to the knowledge of the defendant after issue joined. [*Bosanquet* J. I do not think that fact covered by the denial of the indorsement.] Under the new rules those matters which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, are

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to be specially pleaded. (*a*) [*Bosanquet* J. Infancy coverture are amongst the instances given.] The pres application is not merely to plead that *Craston* wa lunatic at the time he indorsed this note, but want consideration also. [*Tindal* C. J. You are asking favour, and ought to lay before the court some grou for granting it.] The amendment was refused by learned judge, not because no sufficient ground been laid for the application, but on the ground that plea would be substantially bad, as he was of opin that the lunacy of *Craston* furnished no defence.

TINDAL C. J. We think that the defendant ough be allowed to plead the lunacy of *Craston*, but no join that plea with a general denial of the indorsem

The defendant having, on a subsequent day, elec to take a rule nisi in that form,

Talfourd Serjt. now shewed cause. He stated that defendant was in insolvent circumstances.

Stephen Serjt. was heard in support of his rule.

Per curiam. This rule should be made absol upon the terms of the payment by the defendant of costs of the amendment, including the costs of this plication, unless the defendant will, within a fortnig consent to a *stet processus* without costs on either side

Rule absolute accordingly.

(*a*) *Vide* 3 *N. & M.* 8. And see *Alcock* v. *Taylor*, 6 *N. & M.* 296. 298.

(*b*) *Vide Faulder* v. *Silk*, 3 *Campb.* 126., more fully reported 1 *Collinson on Lunacy*, 390.; *Tyrell* v. *Jenner*, 3 *M. & P.* 648., *Co. Litt.* 2 *b.* 16 246 *b.* 247 *a.*, *F. N. B.* 2 *C. D.*, 2 *Bla. Com.* 291.; *T buck* v. *Bispham*, 2 *M. & W. Murley* v. *Sherren*, 8 *A. &* 754., 1 *P. & D.* 126.

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DOE, on the demise of HENRY Duke of BEAUFORT and Others *v.* NEELD.

June 5.

EJECTMENT. The first count was on a demise made by the Duke of *Beaufort* on the 2d of *April* 1840, of 100 acres of land, &c. at *Littleton Drew*, in the county of *Wilts*; the second count was on a demise, laid on the same day, of similar tenements, made by *Granville Leveson*, Earl *Granville*, and Lord *Fitzroy James Henry Somerset*; the third and fourth counts were upon demises of similar tenements made by the duke and by Earl *Granville* and Lord *Fitzroy J. H. Somerset*, respectively, on the 5th of *June* 1840.

The particulars of demand, delivered under a judge's order, stated that the action was brought to recover a certain piece of land situate in the parish of *Littleton Drew*, in the county of *Wilts*, containing about six acres, called *Dunley Wood* or *Dunley Gorse*, and adjoining on a certain field called *Dunley Field*, and on land lately belonging to *Chapman Wallace* deceased.

At the trial before *Wightman* J., at the last *Salisbury* assizes, the following facts appeared: —

The Duke of *Beaufort* (*a*), and the defendant Mr. *Neeld*, were owners of lands in *Littleton Drew*, and enmay consider desirable for them respectively, with an undertaking to ratify and confirm what the commissioner may do in the premises; upon which the commissioner prepares and signs a schedule, specifying the particular closes to be exchanged, which he produces at a public meeting duly convened under the act. The parties take possession of, cultivate, and demise the closes exchanged, agreeably to the schedule.

The commissioner not having published his award,

Held, that ejectment may be maintained by *A.*, to recover from *B.* a close, given up by *A.* to, and taken possession of by, *B.*, under the exchange.

The proprietors of lands in the parish of *Dale* having agreed upon an inclosure under the provisions of the 6 & 7 *W.* 4. *c.* 115., two of such proprietors, *A.* and *B.*, sign, and send to the commissioner, mutual consents to give up certain closes, designated by the numbers attached to them in the commissioner's map, in exchange for such other lands, of equal value, as the commissioner

(*a*) Earl *Granville* and Lord *Fitzroy J. H. Somerset* were devisees of the late duke for a term of 1000 years, with remainder to the present duke for life; but the plaintiff recovered upon a *primâ facie* title in his lessor as son and *heir*.

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titled to rights in the open and common fields in parish. In *April* 1838, a public meeting was c for the 7th of *May*, of the proprietors and person terested therein, to consider of the expediency of curing the open and common fields of the parish inclosed, under the authority of the inclosure act o 6 & 7 *W.* 4. *c.* 115. This notice was duly publi and on the 7th of *May* the meeting was held, an attended by proprietors of lands sufficient in nu and holding property of the required value; the a of the duke and Mr. *Neeld* being also present, and curring in the following written consent.

"A public meeting of the proprietors or perso terested in the open and common arable meadow pasture lands and fields in the parish of *Littleton* in the county of *Wilts*, having been held the 6th d *May* 1838, at the house of *Daniel Chappell* in the parish, and called, for the purpose of taking th pediency of inclosing such lands and fields into sideration, by notice under the hands of three proprietors and persons interested in such incl and affixed on the principal outer door of the c of the said parish on *Sunday* the 21st of *April* last by advertisement in the *Wiltshire* and *Glouceste Standard* of the 21st of the said month of *April*, a newspaper circulated in the county where such lie,) and being, at least, fourteen days before such ing was held, we, the undersigned, not being less two third parts in number and value of the propr and persons interested in the lands intended to closed, do, by this writing under our hands, signi consent to the inclosure of such lands and fields, the extinguishing of the rights of intercommonage exist as well over, as in respect of, the same land fields, under the provisions of an act passed in a s of parliament holden in the sixth and seventh ye

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About the time when the consent was signed by
duke and Mr. *Neeld*, it was agreed, between their
spective agents, that certain exchanges should be m

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of such allotments, assignments, and exchanges shall have been made, should or would have stood severally limited, settled, or subject or liable to, or been held by, in case the same had not been allotted, assigned, or exchanged, and this act had not been made or acted upon, save and except such rents and services as shall have been compensated for, and extinguished, and such leases and tenancies at rack rents as shall become void by virtue of this act, and subject, nevertheless, to all such mortgages and sales as shall be made by authority of this act, or of the said act of the 41st year of His late Majesty *G. 3.* (41 *G. 3. c.* 109.)

By sect. 35. it is enacted, "that it shall be lawful for the commissioners to set out, allot, and award any lands, tenements, or hereditaments, whether situate within the boundary of such open and common lands or fields as aforesaid, or adjoining thereto, within the parishes, townships, or places in which the lands to be allotted and inclosed are situated, or any of them, in lieu of, and in exchange for, any other lands, tenements, or hereditaments, within the same parishes, townships, or places, respectively, or any of them, or within any parish, township, or place, adjoining to the said parishes, townships, or places, respectively, or any of them; provided that all such excha
shall be ascertained, speci
and declared in the awar
the commissioners, and be
with the consent in writi
the proprietor or proprieto
the hereditaments and pre
which shall be so exchan
whether such proprietor or
prietors shall be a bod
bodies politic, corporate, or
legiate, corporation aggreg
sole, rector, parson, vica
other ecclesiastical perso
persons, or a tenant or te
in fee-simple or for life
fee-tail, special, or genera
by the courtesy of *Englan*
for years determinable on
life or lives by and with
consent of the lessor or le
but not otherwise, or with
consent of the guardians,
bands, committees, or atto
of or acting for any such
prietor or proprietors wh
the time of making such
change or exchanges, shal
respectively, infants,
coverts, idiots, lunatics, o
der any other legal disab
or who shall be beyond
seas or otherwise disable
act for themselves, himse
herself, or of the truste
feoffees for charitable, paro
or other uses, or of the p
or persons having power t
and dispose of the hereditam
and premises which shall
exchanged (such consent
testified in writing unde
common seal of the body p

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dividing, allotting, and inclosing the open comm arable, meadow, and pasture lands and fields, in, & under and by virtue of an act passed in, &c.

"I, *Joseph Neeld*, of *Grittleton House*, in the county *Wilts*, Esquire, being the proprietor of lands and he ditaments in the parish, &c., do hereby consent to g up, in exchange for such other lands of an equal va within the same parish as you the said commissio may consider desirable for me, the several old inclosu after mentioned, viz., all those several inclosures mark and numbered respectively in the map of the s parish, 31. 84. 100, 101. 114, 115. 315. 378. 408, 4 410. and 425.; and I do hereby undertake and ag to ratify and confirm whatsoever you, the said co missioner, may do in the premises. Dated, this 3 day of *May* 1839.

(Signed) "*Joseph Neel*

A consent, in the same form, was signed by the du on the 1st of *June* 1839. The inclosures mentioned the duke's consent, as those to be given up by hi were described as "all those inclosures or pieces parcels of land marked and numbered, respective on the map of the said parish, 10, 11, [12.], 13, 14. 25. 27. 30. 99. 113. 546. 553, and 554.

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cause the same to be inrolled in manner as directed by the recited act (41 *G. 3. c.* 109.), and such awards shall be deposited in the respective parish churches wherein the lands so to be allotted and inclosed, or the greater part thereof, are situated."

By sect. 53. it is enacted, "that it shall be lawful for all persons who shall think themselves aggrieved by any thing done by virtue of the act or of the said recited act (41 *G* *c.* 109.), except in cases wh the things so done are herei by the said act (41 *G. 3. c.* 10 declared to be final, bindi and conclusive, to appeal to general quarter sessions of peace, or any adjournm thereof, within six calen months next after the cause complaint shall have arisen, giving notice."

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In pursuance of the exchange then agreed upon, the commissioner, on the 1st of *October* 1839, prepared and signed the following document, specifying the fields to be exchanged, and the quantities of each, in which document, No. 12, which appears in the duke's consent, is *Dunley Wood*, the close in dispute.

AN ARRANGEMENT for effecting Exchanges of sundry old Inclosures in the parish of *Littleton Drew*, in the county of *Wilts*, on the 1st of *October*.

1. *Joseph Neeld, Esq. with Mr. W. Coates.*

No. on Plan.	Names of the Fields.	A.	R.	P.	No. on Plan.	Names of the Fields.	A.	R.	P.
	Coates's.					*Neeld's.*			
314	Gleed's Innocks -	7	1	8	408	Little Thornhill -	2	3	27
547	Foss Ground -	11	0	22	409	Dry Lease Ditto	2	3	21
70	Withy Bed -	1	2	2	100	The Folly - -	1	0	0
85	The Chick -		2	28	101	The Folly - -			39
427	Marsh Mead Ground		3	16	114	Barn Yard - -		1	35
					115	Curnook's Close -	2	2	18
426	Marsh Mead Ground	1	1	24	119	Late Duke's Mead Gate	1	2	16
428	Walk Ground -	2	1	21		Allotment in Upper Mead	3	2	16
		25	1	1			15	1	12

2. *His Grace the Duke of Beaufort with Joseph Neeld, Esq.*

No. on Plan.	Names of the Fields.	A.	R.	P.	No. on Plan.	Names of the Fields.	A.	R.	P.
	Beaufort's.					*Neeld's.*			
10	Dunley - -	5	3	38	315	Curnook's Innocks	11	1	26
11	Dunley - -	8	2	2	378	White Hays -	2	0	29
12	*Dunley Wood* -	6	0	0	409	Dry Lease Innocks	8	3	3
13	Dunley - -	2	3	10	410	Great Thornhill -	12	2	4
14	Dunley - -	7	0	16	425	Under Acre -		1	16
24	Cranhill Ox Lease	6	1	8	314	Gleed's Innocks -	7	1	8
22	Dunley - -	5	2	12	422	Marsh Mead Ground		3	16
99	The Nine Acres -	8	0	25					
113	Mead Gate -	1	2	16	426	Marsh Mead Ground	1	1	24
553	House and Garden		1	39					
554	The Garden adjoining		1	37	428	The Walk Ground	2	1	21
546	The Garden -		1	21		Allotment in Marsh Mead	2	1	38
544	*The Garden at Foss Gate*			4					
		53	1	28			49	2	25

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3. *Joseph Neeld, Esq. with Rev. John Colmer.*

No. on Plan.	Names of the Fields.	A.	R.	P.	No. on Plan.	Names of the Fields.	A.	R.
	Neeld's.					*Colmer's.*		
31	Barnett's Tyning -	2	1	5	1	Danloe Chappel -		1
69	Withy Bed -	3	0	1	15	Dunley - -	14	0
70	Withy Bed -	1	2	2	16	Upper Dunley -	8	1
84	The Chick - -	1	2	2				
86	The Chick - -		2	23				
99	The Nine Acres -	8	0	25				
		17	0	18			22	

4. *His Grace the Duke of Beaufort with Rev. Joh Colmer.*

No. on Plan.	Names of the Fields.	A.	R.	P.	No. on Plan.	Names of the Fields.	A.
	Beaufort's.					*Colmer's.*	
30	Bunhill - -	13	1	26	312	Innocks - -	8
					322	Blind Tyning -	4
					427	Marsh Mead Ground	
		13	1	26			13

(Signed) *William Taylor,*
Commissione

On the 31st of *October* 1839, at a meeting held by commissioner, and attended by *Francis Wedge* as a for the duke, a map prepared by the surveyor was duced, together with a terrier and plan exhibiting several allotments and exchanges, when such allotm and exchanges were explained by the commissio The duke and Mr. *Neeld* afterwards took posse of the lands so allotted to them in exchange.

"The different closes received in exchange wer by the duke and Mr. *Neeld*, respectively, to te from year to year; but as *Dunley Wood* conne Mr. *Neeld's* estate at *Grittleton*, where he resided, a large farm belonging to him in the parish, a pa

Dunley Wood was formed by him into a green road to unite the two properties. It being afterwards discovered by the duke that the closes which he had received in exchange, did not afford the same facilities for fox-hunting as those given up by him, he applied to Mr. *Neeld* to substitute a piece of woodland for some of the arable land taken by him from Mr. *Neeld*, alleging that it had always been his intention to have *wood* for *wood*. This proposal was rejected by Mr. *Neeld* on the ground that he had only a life interest in the wood which he was required to give up, the same having been strictly settled upon his marriage. The duke then demanded possession of *Dunley Wood*, and directed his tenants to relinquish the occupation of the closes received from Mr. *Neeld*; sending, about the same time, the following notice to the commissioners.

"To Mr. *William Taylor*, the commissioner appointed for dividing, allotting, and inclosing the open common, arable, and pasture lands and fields in the parish of *Littleton Drew*, in the county of *Wilts*, under and by virtue of an act passed, &c., intituled, &c.

"I, *Henry*, Duke of *Beaufort*, do hereby give you notice that the paper-writing addressed to you under my hand, bearing date the 1st day of *June* 1839, and purporting that I consented to give up, in exchange for such other lands of an equal value, within the same parish, as you the said commissioners may (might) consider desirable for me, the several old inclosures after mentioned, that is to say, all those several inclosures, or pieces or parcels of land marked and numbered respectively on the map of the said parish, 10, 11, 12, 13, 14. 22. 24, 25. 27. 30. 99. 113. 546. 553. and 654., *was signed by me under a misapprehension*, and that the same is not valid and effectual within the

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intent and meaning of the above-mentioned act of p liament, and is not such a consent as is required the said act for authorizing any such exchange therein mentioned, but was and is absolutely null a void. And I hereby further give you notice, that case the said paper-writing was in any way effect when signed by me, I have revoked, determined, nulled, and made void, and do hereby revoke, det mine, annul, and make void the same, to all inte and purposes whatsoever; and I require you to de from all further proceedings whatsoever, as such co missioner as aforesaid, founded on such aforesaid pap writing. And in case you have, as such commission incurred any costs, charges, and expenses, upon or consequence of the aforesaid paper-writing, I give notice that I am ready and willing, and hereby of to pay you the amount thereof, on your transmitting account thereof to my solicitors, Messrs. *Watkins* a *Hooper*, 11. *Sackville Street*, *London*. Dated, this 1 day of *March*, 1840.

(Signed) "*Beaufo*

The learned judge expressed his intention of dire ing a verdict for the plaintiff, giving the defend leave to move to enter a nonsuit.

The reservation of such leave was opposed on t part of the plaintiff, by *Bompas* Serjt., and *Montag Smith*, who contended that no consent in writing the duke had been shewn, within the meaning of t act; that supposing the duke's assent to the propos arrangement to have amounted to the consent in wr ing required by the act, yet, as the arrangement w entire, it was vicious altogether in consequence of t assent of the ordinary and patron not having be obtained in respect of the lands to be given up *Colmer*, and which were parcel of the glebe; and th

supposing the arrangement to be binding, it would have no effect upon the legal seisin until ratified by the commissioner's award, after which the seisin would be in the respective parties taking in exchange from the time of the consent, supposing that consent to be complete and final.

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For the defendant it was contended by *Erle*, *Manning* Serjt., and *Barstow*, that the consent in writing on the part of the lessor of the plaintiff, to give up certain closes in exchange for such lands of equal value as the commissioner should think desirable for him, with an engagement to ratify and confirm the acts of the commissioner, was such a consent in writing as the statute requires; that it might be presumed that the assent of the patron and ordinary would be given to an arrangement which the incumbent desired, and which the commissioner thought advantageous to the benefice; but that supposing the exchange to be rendered void as to the glebe, it did not follow that it would become necessary to disturb the transfer of *Dudley Wood* from the duke to Mr. *Neeld*. That the 83d section vests the seisin of the lands allotted or exchanged, from the moment of the allotment or exchange, without waiting for the completion of the award, which frequently does not take place until several years after the exchanges have been made and acted upon. *Doe dem. Harris* v. *Saunder* (*a*), (in which case, the learned judge observed, there had been an award,) and *Kingsley* v. *Young* (*b*) were cited on behalf of the defendant.

The learned judge, retaining his original opinion that the point was sufficiently doubtful, directed a verdict to be found for the plaintiff upon the first issue, and for the defendant upon the other three, reserving to the defendant leave to move to enter a nonsuit.

(*a*) 5 *A. & E.* 664., 1 *N. & P.* 119.

(*b*) 17 *Ves.* 468., 18 *Ves.* 207.

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Wilde. Solicitor-General, (with whom was *Mann* Serjt.) in the following term moved according to leave reserved, and exhibited the consents and the c missioner's scheme, and referred to the 1 & 2 *G.* 4. *c.* *s.* 1. (*a*) and *s.* 2 (*b*), and 6 & 7 *W.* 4. *c.* 115. *ss.* 1. 26.

(*a*) Which enacts, "that it shall be lawful to and for every person or persons to whom any allotment or allotments of land has or have been set out or allotted, or which shall hereafter be set out or allotted, and to whom the possession of such allotment or allotments hath been already given by virtue of any order or direction, orders or directions, or to whom the possession thereof shall hereafter be given by virtue of any order or direction, orders or directions in writing, in the form specified in the schedule hereto annexed, and signed by the commissioner or commissioners acting under or by virtue of any act or acts of parliament now or hereafter to be passed for dividing, allotting, and inclosing any open fields, pastures, commons, moors, and waste lands, in *England*, and who shall have demised the same, or any part thereof, to any tenant or servant, or for their, his, or her bailiff or agent, bailiffs or agents, or any person or persons by them, him, or her authorized and employed for that purpose, to enter into and upon any such allotment or allotments, and to seize and distrain any goods, chattels, or effects which may be in or upon such allotment or allotments, or in or upon any other lands, tenements, and hereditaments held, occupied, or enjoyed by the tenant or occupier of such allotment or allotme along and together with such allotment or allotm for any rent that may b arrear and unpaid for al any part of such allotmen allotments, and either alon together with any such a ment or allotments, and other lands, tenements, hereditaments held, occu or enjoyed therewith, *not standing the award or aw of the commissioner or com sioners appointed in, or n by or by virtue of any act or acts so made and pa or to be hereafter made passed, shall not be executed perfected* by such commissi or commissioners, by virtu in pursuance of any such or acts of parliament."

(*b*) Which enacts, "th may be lawful for every pe or persons to whom any allotment or allotments is o already set out or allotte which shall be hereafter se or allotted, and to whom possession as aforesaid hath already given by virtue of order or direction, orders o rections, or the possession w of shall hereafter be given to person or persons, by virtu any order or direction, orde directions in writing, in form specified in the said dule, and signed by such missioner or commissione aforesaid, and to his, he their tenants, stewards, ba

35, 36. 45. (a). [*Tindal* C. J. The forty-fifth section is that which you will have to contend with.] In addition to the cases cited at the trial, *Doe dem. Sweeting* v. *Hellard* (b), and *Doe dem. Dixon* v. *Willis* (c), were mentioned.

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A rule nisi having been granted,

Ludlow and *Bompas* Serjts. now shewed cause. No award having been made by the commissioner, the question is, whether, under the 6 & 7 *W.* 4. *c.* 115. *ss.* 33. 36. 45. a title to hold the close in question was vested in the defendant. [*Tindal* C. J. Sections 1. 26. and 35. were also referred to.] The thirty-third section cannot be made applicable to this case. Its object was merely to prevent any change in the nature of the holding resulting from the exchanges. The thirty-fifth sect. contains a proviso that all such exchanges shall be ascertained, specified, and declared in the *award.* [*Tindal* C. J. That may create a condition subsequent.] The proviso will prevent the exchanged lands from vesting completely in the parties. [*Tindal* C. J. It not unfre-

June 5.

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agents or servants, to commence, prosecute, and maintain any action or suit at law, for any injury or damage that may be done or committed by any person or persons whomsoever, to the ground, soil, or herbage of any such allotment or allotments, or to the walls, hedges, fences, ditches, gates, posts, rails, stills, cloughs, bridges, or tunnels, already erected or to be erected in or upon any such allotment or allotments, and to bring, maintain, and prosecute any action or actions of ejectment, for recovering the possession of any such allotment or allotments, or any part or parts thereof, from any person or persons whomsoever, *notwithstanding the award or awards of the commissioner or commissioners appointed in, or named by or by virtue of any such act or acts now made and passed, or to be hereafter made and passed, shall not be executed and perfected* by such commissioner or commissioners, by virtue or in pursuance of any such act or acts of parliament."

(a) *Ante*, 273 *a.*

(b) 9 *B.* & *C.* 789., 4 *Mann.* & *R.* 736.

(c) 5 *Bingh.* 441. 3 *Mo.* & *P.* 24.

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quently happens that no award is ever made.] T forty-fifth section applies only to allotted lands. T section contains the further proviso, "that no excha shall be made of any lands so held in right of church, chapel, or other ecclesiastical benefice, with consent testified as aforesaid (that is, in writing, un the hand of the patron of the benefice, and of bishop of the diocese in which such benefice is tuate.") It is difficult to conceive that an excha can be complete so as to create change of title be the award is made. [*Tindal* C. J. It has often b held that the legal title in allotments vests in the allo before the making of the award.] In those cases question has arisen after the commissioner has made award. Sect. 45. applies to allotted lands, and no those which have been exchanged. If the legal were, as it is contended, vested in the allottee, the po given by the 45th section would be unnecessary. Un the 41 *G.* 3. *c.* 109. it was always understood that allottee, &c. had no title until the award of the c missioner was made. Then came the 1 & 2 *G.* 4. *c.* authorizing the allottee (sect. 1.) to distrain for rent, (sect. 2.) to bring an action of trespass, in respect lands, of which possession has been taken under an al ment signed by the commissioner, though no award been made; but the authority thereby given does extend to parties in possession under *exchanges*.

Another objection is, that the scheme of the comm sioner does not pursue the consents. According the scheme Mr. *Neeld* is to receive No. 544. from duke, but that number does not appear amongst th enumerated in the duke's consent.

The cases of *Kingsley* v. *Coates*, *Doe* v. *Weller*, *Doe* v. *Saunder*, upon which this rule was obtain were cases, not of *exchanges* of old inclosures, but *allotments* of waste lands to be inclosed; where,

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less the allottee were allowed to take and hold possession, the land would remain without a legal occupier until the award was made. Besides which, in each of those cases an award had been made before the question as to the effect of the allotment arose. In *Farrer* v. *Billing* (*a*) it was held, that a power given by a local inclosure act, to fence their allotments, and to sell and convey before the publication of the award, had not the effect of vesting any legal seisin in the allottees; and, upon the authority of that decision, it was held in *Ellis* v. *Arnison* (*b*), that an incumbent's right to tithes was not extinguished by a statutory allotment of lands in lieu of tithe, under an inclosure act, until the commissioner had made his award.

The duke has filed a bill against Mr. *Neeld* and the commissioner, for an injunction to restrain the latter from proceeding to make his award in conformity with the scheme or arrangement; and Mr. *Neeld* has filed his bill for an injunction to restrain the duke from proceeding in this action of ejectment. In the former suit the Vice-Chancellor has granted an injunction against proceeding with making of the award; but, in the latter suit, he has dissolved the injunction.

Manning Serjt. (with whom was *Wilde* Solicitor-General) in support of the rule. By the consents the parties not only gave up certain specified closes, but also authorized the commissioner to determine what other lands they should receive in exchange, undertaking to ratify and confirm whatsoever he might do in the premises. These consents were, within the meaning of the thirty-fifth section, prospective consents in writing to the particular exchanges arranged by the commissioner, subject, it is true, to a possibility of being de-

(*a*) 2 *B. & Ald.* 171. (*b*) 5 *B. & Ald.* 47.

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feated by the non-performance of the condition sub
quent of such exchanges being ascertained, specifi
and declared in the award.

If the language of the forty-fifth section, which spe
of a consent in writing to the exchanges, is to be c
sidered as requiring the signature of the parties t
document, specifying all the closes to be given up,
also those to be taken in exchange, it must be admi
that the legal seisin in respect of *Dunley Wood* rem
in the duke; and that, at law at least, he had
power to withdraw from the engagement entered i
by what has been called his consent of the 1st of
1839. But if a writing expressing the closes to
given up, and containing an absolute and unconditi
consent to accept such closes in exchange as the c
missioner should appoint, satisfies the terms of the fo
fifth section; or if the court shall think it suffi
that there is a writing signed by the duke, particulari
the closes to be given up, and a writing signed by
commissioner particularising the closes to be receive
exchange, such last mentioned writing being prep
and signed under an express authority precedent,
ratified by the acceptance of the duke's agent at
meeting of the 31st of *October*, and recognised and
firmed by the subsequent taking possession, and dem
of the closes received in exchange as the duke's
land, then it is submitted, that the exchange contemp
by the forty-fifth section has actually taken place.
parties, at all events, have in the most clear and dis
terms, conferred upon the commissioner the pow
making exchanges between them. That power
acted upon by the commissioner, and recognised,
need recognition, by the parties; and in *March* 18
was too late for the duke to revoke the authority af
had been so completely exercised.

But supposing that the legal title to the close

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quired under the exchanges was not complete, the parties upon giving and taking possession respectively, would at least become tenants at will to each other. In order to determine that tenancy at will, a demand of possession was necessary. Where, by one agreement, *A.* demises *Whiteacre* to *B.*, and *B.* demises *Blackacre* to *A.*, it is submitted that *A.* cannot put an end to *B.*'s tenancy of *Whiteacre* by a demand of possession of *Whiteacre*, without at the same time relinquishing or offering to relinquish the possession of *Blackacre*. Here, the duke, having demised, to tenants from year to year, the lands which he took in exchange from Mr. *Neeld*, was not in a situation to relinquish the possession of such lands; and though it appears that the duke's tenants ceased to cultivate, no act had been done to put an end to their tenancy of those lands under the duke. [*Tindal* C. J. When this motion was made, it was contended, as it had been at the trial, that from the time of the making of the scheme or arrangement, the defendant became seised of the lands assigned to him in that scheme or arrangement, of the same estate to which he would have been entitled, if the award of the commissioner had been made and published. The real point in the case is, whether there has been such a consent in writing to the exchanges as the statute requires, and whether the freehold, or the right of possession, in the close in question, has vested in the defendant.] That question will depend upon the language of the thirty-third section, the effect of which, it is contended, is, not merely to fix the nature of the tenure of the lands when they shall be vested in the new proprietors, but to determine the period at which they shall so vest; that period being distinguished from the time when the award shall be made, and declared to be,—immediately after such exchange shall be made. In *Doe dem. Harris* v. *Saunder* it was held, upon the construction of a clause similar to

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the thirty-third section of the 6 & 7 *W.* 4. *c.* 115., the allottee became seised of the allotment from time of his being put in possession by the commissio In that case *Patteson* J. says, "the legislature may tainly, by proper words, give the seisin and legal es upon the allotment only, and before the execution of award. Here, the legislature has used proper words the purpose of giving the seisin and legal estate u the allotment only." [*Erskine* J. *Doe* v. *Saunder* w case of allotment; and by the express words of the l act, the property in the land allotted vested in the lottee from the time of the allotment being ma In this case, the property in the lands exchanged is the thirty-third section of the general act, to vest, u the exchange being made; and the exchange was mad soon as the commissioner had acted under the autho given him by the parties.] The absence of consent on part of the patron and ordinary would not affect the change as to *Dunley Wood.* The glebe lands form part of the closes transferred from Mr. *Neeld* to the d [*Coltman* J. Supposing the duke and Mr. *Neeld* have been seised in fee of the several closes, and have negotiated an exchange at common law, cou be said that what took place was sufficient to tran the property?] At common law an exchange of l can only be by deed. It is a peculiar and techn form of conveyance, which requires the observance of ticular forms, and is subject to particular incidents to none of which the statutory exchange effected u the authority of enclosure acts presents any anal Supposing however the legal seisin to remain in the d yet, as there is, in this case, a regular statutory cours proceeding in progress towards an award, the court not allow the views of the legislature to be frustrated

(a) *Vide Co. Litt.* 50, 51.

a fictitious proceeding, by a literal compliance with the terms of the consent-rule, which is attempted to be substituted for a substantial performance of the engagement to rest the defence upon title only. It cannot be supposed that the legislature intended to leave in the former possessor a right to re-enter upon lands, in respect of which, powers of distress, and the right to bring an action of trespass, as upon a lawful possession, and even the right to recover the possession by an action of ejectment (a), are given to the new statutory possessor in the case of an allotment, yet the language with respect to the vesting of lands exchanged, in the respective parties, is precisely the same as that which vests allotments.

No. 544. was one of the closes which at the meeting that preceded the signing of the consents, was agreed by the duke's agent to be given up. Being a small waste spot of trifling value, it was overlooked by the party who prepared the consent for the duke's signature. It was proved at the trial, that immediately upon the mistake being discovered, Mr. *Neeld* gave notice that he relinquished all claim to No. 544., without requiring any compensation or equivalent. It is rather ungracious that the counsel of the duke should take this objection, when the only consequence of the omission, caused by the negligence of *his own agent*, is, that the duke keeps No. 544., and is, at the same time, paid for it, in the lands he receives from Mr. *Neeld*, as though he had given up No. 544.

It is true that the Vice-Chancellor refused to grant an injunction against the present action; but it is equally true, and equally well known to those who instruct the learned counsel who have shewn cause against this rule on the part of the duke, that, upon appeal to Lord *Cot-*

(a) *Ante*, 282.

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tenham C., that learned person has intimated his in tion of reversing the decision of the Vice-Chancellor, of granting an injunction against the proceedings in present action.

TINDAL C. J. The only question for us to deter is, whether such an exchange has taken place betw these two parties as will vest the legal interest in close in question in the defendant. In the view w I take of the case, it is unnecessary to determine whe the legal interest *could* pass to the respective pa before an award was made. I put the case upon short ground that no consent was given in fact. 35th section, which authorises the exchange of inclosures, provides that all such exchanges shall ascertained, specified, and declared in the award of commissioner or commissioners, and be made with consent in writing of the proprietor or proprieto the hereditaments and premises which shall be so changed. No award has been made. Neither has t been an exchange. An exchange is a mode of transfer land well known to the law, and is well defined by *tleton*, sect. 64., &c. The question is, whether a si consent in writing to the giving up of certain spec lands, without stating what is to be taken in excha is an actual exchange within the meaning of the sta It appears to me that there should be something a rent in writing as to what is to be *taken*, no less tha to what is to be *given up*. I think that a consen writing to the giving up of certain lands to an unkn party, in exchange for lands equally unknown, is such a consent to an exchange as the statute templates. The duke signed a paper in which he pressed his willingness to give up certain closes t exchanged. But that does not bind the duke to ac in exchange whatever closes the commissioner

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choose to assign to him. (a) Here, the parties appear to have mutually misunderstood one another. Can there exist, under such circumstances, the consent meant by the act? I think that there should be a consent by both parties to the exchange, after the particulars of the proposed exchange have been arranged. What effect such a complete consent would have towards a vesting of the legal estate, it will be unnecessary to inquire. It seems to me that the whole case has arisen from a mistake, in supposing that to have been a final settlement and disposition of the property, which was, in fact, merely a proposal. I therefore think that the thirty-third section, upon which the defendant has mainly relied, does not apply to the facts of this case. I am consequently of opinion, that the rule which has been obtained, for entering a nonsuit, must be discharged.

Coltman J. I am of the same opinion. The thirty-fifth section points out in what manner exchanges are to be made. That section provides that it shall be lawful for the commissioners to *set out, allot, and award* any lands, tenements, or hereditaments whatsoever, whether situate within the boundaries of such open and common lands or fields or adjoining these, within the parishes, or in which the lands to be allotted and inclosed are situated or in any of them, in lieu of an exchange for any other lands &c., within the same parish respectively, or any of them, or within any parish &c., adjoining to the parishes &c., or any of them, and that all such exchanges shall be *ascertained, specified, and declared* in the award, and be made *with the consent in writing* of the proprietor or proprietors of the hereditaments and premises which shall be so exchanged, such consent to be testified in writing under the common seal &c.

(a) See the duke's last letter to the commissioner, dated the 1st of *June* 1840; *ante*, 276.

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and under the hands of the other consenting par respectively. There must therefore be a setting allotting, and awarding by the commissioner upo written consent by the respective parties to the change of specific lands, &c. The thirty-third sec does not regulate the time at which the exchanges to be considered as complete. It merely puts pa who have particular interests under settlements &c the same situation with respect to lands &c. receive exchange, when the exchange shall have been c pleted under the provisions of the thirty-fifth sec as they were in before with respect to the lands which they give up. The question at what period exchange is effected, must be decided upon the lang of the thirty-fifth section.

ERSKINE J. Giving the fullest effect to the th third section, and conceding that the property in l exchanged *might*, for any thing that appears in that tion, vest before the award, we must look at the other of the act, to see whether what has been done in this amounts to an exchange. It may be that the proper lands *allotted* vests before the award; but it appea me, that, under the provisions of the statute, an *exc* cannot be said to be complete until the award is ally made. The exchange must be made by the auth of the commissioners, and with the consent of the pa It appears to me, that there has been no exchan fact by the authority of the commissioner, or wit consent of the parties, as I consider a consent expr in writing to the specific exchanges to be the conse quired by the act. The parties themselves can h be said to have considered that the exchanges were plete. They appear to have had confidence in other, and to have trusted that the scheme propos the commissioner, and to which they verbally ass

would afterwards be ratified in due form. I am therefore of opinion that the rule for entering a nonsuit should be discharged.

Maule J. I am also of opinion that this rule should be discharged. A *primâ facie* title having been shewn in the lessor of the plaintiff, the defence set up was, an exchange under the provisions of the 6 & 7 *W.* 4. *c.* 115. (*a*), which authorises exchanges made by the commissioner with the consent of the parties. I think that the utmost effect which can be ascribed to the papers given in evidence at the trial, is, that they conferred an *authority* on the commissioner to dispose of the lands so contained in the different consents, and to make such arrangements as, having the whole before him, he might find to be the most convenient to the parties. In the case of a simple exchange of one field for another, the intervention of the commissioner would scarcely have been required; but when the closes of *several* parties were to be dealt with, it was natural to select a person in whose skill, and in whose knowledge of the property, confidence was felt. This, however, is a special authority delegated by the parties to that person, to arrange such a complicated series of exchanges, — an authority wholly independent of the powers conferred on him, as commissioner, by the act. The arrangements made by the commissioner under this special authority may be binding as between the parties, and not revocable like a submission to arbitration before the 3 & 4 *W.* 4. *c.* 42. (*b*) But they would be binding, not as transferring the legal

(*a*) *Antè*, 273. (*a*).

(*b*) Even before that statute, a submission to arbitration could not be revoked after the power of the arbitrator had been executed. Here, the execution of the power *specially delegated*, would appear to be, the delivery to the parties of the scheme containing the several exchanges which the commissioner had by the specially delegated authority been empowered to make, although he would not be *functus* his *statutory* power until the award was published.

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title to the lands exchanged, but as placing the par under an obligation to "ratify and confirm what the c missioner should do in the premises," — that is, to con to the exchange, — when decided upon and ascertaine the commissioner, — in the form prescribed by the The only question now before the court is, whether the 2d day of *April* 1840, the lessor of the plaintiff entitled at law, not whether he was entitled in eq to the possession of the close in question. Upon facts of this case, the right of possession, at law, clearly in the Duke of *Beaufort*.

Rule discharged

(*a*) The first legal step taken by the duke, in repudiation of the exchanges, was an action of trespass *quare clausum fregit*. The defendant, *Neeld*, having pleaded several special pleas in justification of his entry upon the *locus in quo*, the proceedings in trespass were abandoned, and the action of ejectment was brought. A bill was also filed in the court of Chancery against Mr. *Neeld* and Mr. *Taylor*, the commissioner of inclosure, and others, for the purpose of restraining the commissioner from proceeding to make his award upon the footing of the scheme. Mr. *Neeld* then filed his cross bill against the duke for an injunction against the proceedings in ejectment.

The common injunction til answer, having been gr in each case, *Shadwell* V upon the coming in of th swers, continued the injun restraining the commiss from proceeding with the a and dissolved the injun restraining the duke from ceeding with the ejectmen

Upon appeal from ea these decisions, Lord C *ham* C. granted an injun against proceeding furth the action of ejectment, an solved the injunction restra the commissioner from pro ing to make his award. cases were afterwards ca by the duke, by appeal, t House of Lords; in which are now (*March* 1843) pen

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June 11.

TRESPASS *quare domum fregit.* The defendant by his plea denied the plaintiff's possession of the house at the time of the alleged trespass.

At the trial, before Lord *Abinger* C. B., at the last *Kingston* assizes, the jury, contrary to the direction of the learned judge, who was of opinion that the *right* of possession was, upon the evidence, in the defendant, found a verdict for the plaintiff, damages 250*l.*

In granting a new trial it is no ground for refusing to annex the condition of payment of costs by the party obtaining the rule, that the attorney of the adverse party was not on the roll of attorneys when those costs were incurred.

In *Easter* term last, *Wilde*, Solicitor-General, obtained a rule nisi for a new trial, without payment of costs, on the ground of the verdict having been *perverse*. Against which rule

Shee Serjt., in this term, shewed cause.

May 29.

The rule for a new trial was made absolute *on payment of costs*, the court being of opinion that the verdict, though apparently not warranted by the evidence, was not a *perverse* verdict.

June 11.

On a subsequent day, *Wilde*, Solicitor-General, moved for a rule calling upon the plaintiff to shew cause why the rule pronounced by the court in this cause on the 29th of *May* last should not be amended by striking out the words "on payment of costs." It has lately been discovered that the plaintiff's case was conducted by a person whose name is not upon the roll, and who is therefore not entitled to recover costs from the plaintiff. The defendant therefore ought not to be required to pay

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costs, either to the attorney who is not entitled to re them, or to the plaintiff who is not liable to pay th

Sed per curiam. That is an objection to be before the master. It is no ground for the interfe of the court in the first instance.

Rule refuse

(a) In taxing the costs of the former trial upon the rule absolute for a new trial, the master would appear to be bound to allow the plaintiff such costs as he had actually paid to his non-qualified attorney, and such sums as he had advanced to him on account of costs, (not, of course, exceeding, in the whole, the sum at which those costs were taxable as between party and party,) at least v at the time the attorney w ginally employed, the clie not apprised of the disq cation. And see *Meek Whalley*, 1 *New Cases*, 4 *Moore & Sc.* 494.; *phreys* v. *Harvey*, 1 *N. C* 4 *M. & Sc.* 500.; *Ree Bloom*, 3 *Bingh.* 9.; *Moore*, 261.; *Young* v. *man*, 3 *Younge & Jerv.*

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WOLLASTON and Others *v.* HAKEWILL. *June* 11.

In covenant upon an indenture of lease for non-payment of rent and non-reparation, the declaration alleged, that all the estate of the lessee, *in a great part of the demised premises*, (*a*) came to and vested in the defendant by assignment, whereupon and whereby the defendant became possessed. The defendant pleaded, that the said part of the premises did not come to or vest in her by assignment.

Held, that the allegation was sustained by shewing that *A.*, an assignee of the term, demised *part* of the premises (the rent sued for being specifically reserved in respect of such part) to *B.* for a period exceeding the then remainder of the term, reserving a new rent, payable to himself, exceeding in amount that reserved by the original lease, and that the defendant was the executrix of the executor of *B.*; although the defendant had not entered, or done any act beyond taking probate of *B.*'s will.

Semble, that the new rent, so far as it exceeded the rent reserved by the original lease, would be a *rent-seek*.

The registered memorial of a deed conveying lands in *Middlesex*, is secondary evidence of the contents of such deed, against the personal representatives of the party by whom such deed is registered.

It is too late to object to the competency of a witness, when such witness, after having been examined upon matters on which the objection to the competency might have been taken, has left the box, and is recalled for another purpose in respect of which the objection also arises.

COVENANT. The declaration stated that *James Haygarth*, before and at the time of the making of the indenture thereinafter next mentioned, was lawfully possessed of the tenements thereinafter demised to *Thomas Stead*, — for the residue of a term of ninety-nine years, commencing from the 29th of *September* 1787; that being so possessed thereof, by a certain indenture made on the 28th of *April* 1791 between *Haygarth* of the one part and *Stead* of the other part, *Haygarth* demised to *Stead* a piece of ground, and a messuage and premises in the said indenture mentioned, *habendum* to *Stead* his executors, administrators, and assigns for ninety-nine years from *Midsummer* 1786, at the yearly rent of a peppercorn for the first four years, and at the yearly rent of 9*l.* 9*s.* during the remainder of the term,

(*a*) *Vide post*, 319. (*a*).

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payable quarterly. The declaration then set out co nants by *Stead*, to pay taxes, rates, &c.; to pay an ditional ground rent of 4*l.* 4*s.* for every dwelling ho that should, during the term, be erected and built the back part of the demised premises; and to k the demised premises and the pavements in the fr thereof, &c. in repair.

The plaintiffs then conveyed the reversion for y from *Haygarth* to themselves, as tenants in comm by various mesne assignments. (*a*)

Averment: that on the 28th of *April* 1790, *S* entered and became possessed of the demised premi the reversion thereof belonging to *Haygarth*; that a the making of the first mentioned indenture, and du the term thereby granted, to wit, on the 30th of *Ma* 1830, "all the estate, right, title, interest, term of y then to come and unexpired, property, profit, cl and demand whatsoever of the said *T. Stead* of an a *great part* of the demised premises, with the appu nances, situate and being on the back part thereof assignment thereof then made, came to and vested the defendant; whereupon and whereby the defend then became and was possessed of the said part of demised premises, with the appurtenances, and c tinued so thereof possessed from thence until the co mencement of this suit;" that after the making of first mentioned indenture, and during the term ther granted, to wit, on the 1st of *January* 1819, a cer dwelling-house was erected and built on that part the demised premises which so came to and vested the defendant as aforesaid, that is to say, on the b part thereof; whereby the said additional rent of 4*l.* became and was payable for the said dwelling house

(*a*) The mesne assignments are not set out, as the derivative title of the plaintiffs admitted on the record.

erected and built as aforesaid; that after the making of the first mentioned indenture, and after the plaintiffs became respectively possessed of and entitled to the said reversions (*a*) as aforesaid, and after the said assignment to the defendant, and during the term by the first-mentioned indenture granted, to wit, on the 29th of *September* 1835, 8*l.* 8*s.* of the said additional yearly ground rent of 4*l.* 4*s.* for the last mentioned dwelling house for two years of the last mentioned term ending on the day and year last aforesaid, and accruing after the plaintiffs had so become possessed of and entitled to their said respective reversions as aforesaid, became and was due and payable from the defendant, and still is in arrear and unpaid to the plaintiffs, contrary &c.

The declaration then alleged a nonpayment of 16*l.* 16*s.* for two years of arrears of ground-rent, accruing on the 29th of *September* 1835, in respect of two other houses erected on that part of the demised premise which so came to and vested in the defendant as aforesaid; and also that the defendant, after the plaintiffs had become possessed of and entitled to the said reversions as aforesaid, and after the said assignment to the defendant, and during the term by the first-mentioned indenture granted, neglected to repair that part of the demised premises which so came &c., contrary &c. And so the plaintiffs say, &c.

Profert of the indenture of demise, and of certain letters testamentary, through which the plaintiffs' title to this chattel reversion was deduced from *H. J. Wollaston*, of whom they were legatees in common.

Plea, that all the estate, right, title, interest, term

(*a*) Had the plaintiffs been assignees of the reversion in different portions of the demised premises, they would have had several *reversions;* but they were tenants in common of one entire undivided *reversion* in the *whole* of the demised premises. *Vide Roberts* v. *Snell, antè,* Vol. I. 577.

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of years then to come and unexpired, property, pro claim, and demand of the said *T. Stead*, of and the said part of the demised premises with the purtenances, by assignment thereof made, did not co to or vest in the defendant, *modo et formâ*,—conclud to the country. Issue thereon.

At the trial before *Coltman* J., at the sittings at *W minster* after *Hilary* term 1839, it appeared that *H garth* held the premises in question (among othe for the term mentioned in the declaration under indenture of lease from Lord *Southampton*, bea date the 1st of *December* 1789. In order to pr that the underlease, granted by *Haygarth* to *Stead* the 28th of *April* 1791, had vested in the defen as assignee (the only issue raised upon the pleadi the plaintiffs shewed that *Stead*, by an indenture of 29th of *April* 1792, assigned the residue of his t to *William Pittman* by way of mortgage to secure l and interest; that by an indenture of the 2d of *Nove* 1792, between *Stead* of the first part, *Pittman* of second part, *William Thick* of the third part, and *J Houson* and *Peter Whitewood* of the fourth part, *Pit* by the direction of *Stead*, and appointment of *T* assigned the residue of the term to *Houson* and *W wood*; that by a deed-poll of the 23d of *March* 1 *Houson* and *Whitewood* assigned such residue to *Th* that by an indenture of the 5th of *June* 1804, " demised, leased, set, and to farm let" unto *Th Papworth* the premises in question, from the 24th of *June* 1804, for and during the residue the come and unexpired of and in the term of ninety years, granted by the indenture of the 1st of *Dec* 1789, at the yearly rent of 21*l*., with a proviso (w never took effect), that if *Papworth*, his executors, should within the first seven years pay to *Thick*

executors, &c., 200*l.*, then the rent of 21*l.* should cease, and *Papworth*, his executors, &c. should thenceforth pay the rent of 9*l.* 9*s.* reserved by the lease from *Haygarth* to *Stead*; that *Papworth* bequeathed all his leaseholds to *Henry Hakewill* and *J. S. Blackmore*, whom he appointed his executors upon trust; that on the 3d of *May* 1817, *Papworth* died; that on the 30th of *May* 1817, *Papworth's* will was proved by his executors; that on the 30th of *January* 1827, *Blackmore* died; that on the 30th of *March* 1830, *Henry Hakewill* died, having by his will appointed his widow, the defendant, sole executrix, who on the 4th of *May* 1830, proved the last-mentioned will.

The defendant was not shewn to have interfered in any way with the premises in question, but was sought to be charged as assignee of the term in such premises by operation of law.

It was objected on the part of the defendant, that the demise from *Thick* to *Papworth*, being of a portion only of the premises demised by *Haygarth* to *Stead*, and at a different rent and for a different term, did not operate as an assignment; and that at all events the defendant was not chargeable as assignee, being at most executrix of an assignee.

In tracing the mesne assignments of the term, the proof given of the deeds of the 2d of *November* 1792, the 22d of *March* 1799, and the 5th of *June* 1804, was, the production of the memorials filed in the register office for *Middlesex*. The defendant had been served with notice to produce the original deeds; and *Charlotte Thick*, who was the daughter and executrix of *William Thick*, stated that she had made a fruitless search for such deeds amongst her father's papers. She afterwards proved that her father had received rent from *Henry Hakewill* for the premises in question, and that after her

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father's death, *Henry Hakewill* had paid such ren herself as his personal representative.

It was objected that the memorials were not suffic proof of the deeds, and that *Charlotte Thick* was incompetent witness, being interested in relieving self from liability to the rent, by charging the fendant. The objection to the competency of *Char Thick* was not taken until after she had left the wit box, and was recalled by the plaintiffs to prove the ment of rent by *Henry Hakewill.*

The foregoing objections were severally overrule the learned judge, and a verdict was entered for plaintiffs; leave being reserved for the defendan move to enter a nonsuit, in case the court should opinion either that the lease from *W. Thick* to *Papw* did not amount to an assignment, or that the defen being only an executrix, was not chargeable as *assignee* of *Papworth.*

Bompas Serjt. in *Easter* term 1839, obtained a nisi, for a nonsuit on the points reserved; or for a trial on the ground of the inadmissibility of the morials, and the incompetency of *Charlotte Thick.*

Stephen Serjt. and *Byles* shewed cause. The objection taken on the part of the defendant, was, the lease from *Thick* to *Papworth* did not operate assignment. It is said that the lease did not amou an assignment, being at a different rent, and for a l period. It is evident that it was intended by the p to be an assignment. *Papworth* was to *purchas* ground in question for 200*l.*, which sum, until pay was to be secured thereon. There can be no doub the deed transferred all the interest in that part o demised premises to *Papworth.* The same instru

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may be a lease for some purposes, and an assignment for others. It was immaterial to the representative of *Haygarth*, what amount of rent was reserved as between *Thick* and *Papworth*. Can an assignment mean any thing more than a transfer of the estate of the assignor to the assignee? As between a reversioner and an assignee of the term this question could hardly arise; but there are several cases in which it has arisen between parties interested in the term. In *Hicks* v. *Downing* (*a*) it is laid down, that "if lessee for *three* years assigns his term for *four* years, or demises the house for four years, he does not, by this, gain any tortious reversion, and it does but amount to an *assignment* of his interest." (*b*) In *Palmer* v. *Edwards* (*c*), which is, in substance, similar to the present case, the instrument was held to be an assignment. *Buller* J., there speaking of *Poultney* v. *Holmes* (*d*) says, "that case only determined that what cannot be supported as an assignment, shall be good as an underlease, against the party granting it." *Preece* v. *Corrie* (*e*), *Baker* v. *Gostling* (*g*), *Hartshorne* v. *Watson* (*h*), will be cited on the other side. All these were cases between parties claiming *under* the original demise; and it may be admitted, that although the termor transfer all his interest in the term to the transferee, a contract in the nature of a demise may be created, as between themselves. As far as the reversioner is concerned, however, it amounts to an assignment of the whole term.

The second and principal objection is, that the defendant, being only the executrix of an assignee, and

(*a*) 1 *Ld. Raym.* 99.; *post*, 323.

(*b*) *i. e.* The assignment, or the demise, being void for the excess, would pass only the lessee's interest.

(*c*) 1 *Dougl.* 187. n.

(*d*) 1 *Stra.* 405.; *post*, 312.

(*e*) 5 *Bingh.* 24., 2 *Mo. & P.* 57.

(*g*) 1 *New Cases*, 19., 4 *Mo. & Sc.* 539.

(*h*) 5 *N. C.* 477., 7 *Scott*, 493.

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not having entered, is not chargeable as assignee term. It is said, that to hold this would be t the defendant liable *de bonis propriis*. The i taken on the assignment only, and not upon the The entry is a necessary part of the assig [*Maule* J. You would say that the defendant have renounced the executorship.] She migh pleaded that the rent was more than the value premises. [*Tindal* C. J. That is where she l tered: does she want such an allegation whe has not entered?] Then executors might re enter. [*Tindal* C. J. If so, you could declare them in the detinet.] The position that an tor may discharge himself by not entering, d upon the authority of Serjt. *Williams* in his *Jevens* v. *Harridge* (*a*); but this position will examination, appear not to be well founded. period when that note was written, the law was su to be very different from what it has since bee to be. It was then conceived that an assignee of was not chargeable without entry. It had been in *Eaton* v. *Jaques* (*b*), that if a term were assig way of mortgage, the lessor could not sue the mo as assignee "of all the estate, right, title, term to come and unexpired property, profit, claim, mand whatsoever, of the lessee of, in, and to mised premises," even after the mortgage had be feited, unless the mortgagee had taken actual pos [*Tindal* C. J. There is no occasion for an entry the assignee where the assignment is under h seal.] In *Walker* v. *Reeves* (*c*), which was an ac covenant against the assignee of the lessee, the ant pleaded an assignment over to one *Riggs*, by of which assignment *Riggs* entered. The plain plied, that at the time when the rent sued for

(*a*) 1 *Wms. Saund.* 1.
(*b*) 2 *Dougl.* 455.
(*c*) 2 *Dougl.* 461. n

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due, the defendant remained in possession — *absque hoc* that *Riggs* entered. The court held the replication bad, as the assignment was, like that in *Eaton* v. *Jaques*, a mere mortgage transaction. The decision in *Walker* v. *Reeves* was impeached by *Turner* v. *Richardson* (*a*); where, however, it was held that assignees of a bankrupt, who never took possession, could not be charged as having taken the premises by assignment. After the publication of Serjt. *Williams'* note, the case of *Williams* v. *Bosanquet* (*b*) was decided, in which *Eaton* v. *Jaques* was expressly overruled, and in the last edition of *Wms. Saunders*, vol. 1. p. 112., the note in the preceding edition is thus observed upon. "This is true wherever the defendant is sued as executor, which appears to have been the case in all the instances here cited: but it is laid down in 1 *Salk.* 317., *Buckley* v. *Pirk*, that the plaintiff has his election to charge the defendant as assignee, in which case the judgment is *de bonis propriis*. See also 4 *T. R.* 75., *Derisley* v. *Custance*, in which it was held that the heir might be sued in covenant, as assignee." [*Tindal* C. J. In *Turner* v. *Richardson* it was held that the assignees may take part and reject part; and in *Williams* v. *Bosanquet* the defendants *assented* to the assignment; it being found by the special verdict "that the indenture of mortgage was delivered to the defendants, who *accepted* the same."] In the case of an executor there can be no election to take part and reject part. [*Tindal* C. J. Why should an executor be liable on a covenant more than on a bond?] An entry is not necessary for the purpose of vesting the estate. By taking probate the executor assents to becoming assignee of any term vested in the testator. It is said in *Williams on Executors*, 1376. (3d ed.), "If the executor does not enter, he is still chargeable as executor, in the detinet,

(*a*) 7 *East*, 335. (*b*) 1 *Brod. & B.* 238., 3 *B. Moore*, 500.

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because he cannot so waive the term as not to be to the rent as far as he has assets." [*Bosanquet* has been supposed that an entry was necessary case of an assignment as well as in that of an o lease, where the lessee, until entry, has merely *teresse termini*; but that is not so, for where the once well created, it passes by assignment witho entry by the assignee. The passage in *Willi Executors* is erroneous, if it means that an actu is essential.] The author appears to speak of e a mode of testifying assent. [*Tindal* C. J. The doubt that there would be a liability, as executo out entry; but you lay hold of that to make hi as assignee.] If the party becomes executor by probate, his assent dispenses with the necessit entry. An executor cannot discharge himsel liability to repair. The authorities cited in *Will Executors*, do not sustain his position. [*Maule* contend that entry is immaterial; and that consent cient to charge the executor.] It is submitted fact of an entry is immaterial, and that the exe liable without any entry. In *Tremeere* v. *Mo Bosanquet* J. says, "The general rule is, that the e of a lessee (*who enters* (*b*)) is liable as assignee, that, with respect to rent, his liability does not what the property yields; no such exception a the covenant for repairs." In that case the po contended for was not suggested to the court; o the decision, which excited some surprise, might h different. In *Nation* v. *Tozer* (*c*) one of two e of a termor entered, and it was held that such e not enure as the entry of both, so as to mak liable in an action for use and occupation. B livering the judgment of the court, *Parke* B. say

(*a*) 1 *New Cases*, 89.
(*b*) *S. C.* 4 *Mo. & Sc.* 615.
(*c*) 4 *Tyrwh.* 565. *& R.* 172.

do not say whether he might or might not be liable jointly with his co-executor in their own right, even without an entry by either, to an action of debt for rent accruing due after the testator's death, as the term vested in both by operation of law; for after accepting the executorship, neither of them could waive the term. All we decide is, that he is not liable to an action for the use and occupation of that which neither he nor any one whose act is in point of law his act, has been in the actual possession." In *Hargrave's* case (*a*) the lessee died intestate, and *Hargrave* took out administration. The lessor brought an action of debt in the *debet* and *detinet* against *Hargrave* for rent accruing after the death of the intestate. Upon a motion in arrest of judgment, it was held that the action was well brought in the *debet* and *detinet*. But the decision in that case was reversed in the Exchequer Chamber. (*b*) In the case cited by Serjt. *Williams* from 1 *Roll. Abr.* 603. pl. 10, the executor was held liable in the *debet* and *detinet*, by reason of *possession*. So, in *Wentworth's Office of Executors*, p. 194., it is assumed that the executor had taken possession. And in *Lord Rich* v. *Frank* (*c*) the action was brought in the *debet* and *detinet*, upon a lease made to the defendant's intestate, for rent accruing due after his death. It was moved in arrest of judgment that the action ought to have been in the *detinet*, because he was charged as administrator and not for his own debt; but it was adjudged that the action was well brought. In *Caly* v. *Joslyn et ux.* (*d*), in debt for rent upon a lease for years against an executrix in the *debet* and *detinet*, the defendant pleaded *plene administravit*. Upon a demurrer to this plea it was held, that the action was properly brought in the *debet* and *detinet*, on the ground that if an executor were sued in the *detinet* only, where

(*a*) 5 *Co. Rep.* 31 *a.*
(*b*) *Cro. El.* 712., *post*, 326.
(*c*) *Cro. Jac.* 238.
(*d*) *Aleyn*, 34.

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plene administravit would be a good plea, he mig
tain the land, and, with the profits, satisfy other
and that the land should, *primâ facie*, be intended
of greater value than the rent. In *Sackville* v. *Ev*
the court say that, "although an administrator o
cutor may waive the occupation of a term, and the
shall be chargeable no further than they have
yet if they do possess the term, they shall be char
for the rent *de bonis propriis*, if it incurs in thei
times." (*b*) This, however, was rather an assu
than a decision. In *Hellier* v. *Casebert* (*c*) debt f
was brought against the administrator of a lesse
pleaded that before the rent became due he h
signed the term. Upon demurrer to the plea,
held to be bad by reason of the privity of contr
tween the lessor and the administrator of the
And *Wyndham* J. said, "that an executor can
waive a term, but that he shall be charged with t
if he have assets; for he is bound to perform a
tracts of the lessor if he have assets, be the ren
the value of the land or not:" and *Keeling*
"that he cannot so waive it; but that he
charged in the *detinet*, on which the assets shall
question; and if he continue the possession, he s
charged in the *debet* and *detinet*, in respect of t
ception of the profits, has he assets or not." Th
all the cases on which Serjt. *Williams* founds his
and they do not support it. In the same note a
cited of *Buckley* v. *Pirk* (*d*), in which it was he
where a defendant is charged as executor, judgme
be *de bonis testatoris*, though he might have been
as assignee. [*Tindal* C. J. What is said in t
by *Parker* C. J. is very strong. "He held tha
executor of a lessee enters, the lessor may cha

(*a*) *Freeman*, 171.
(*b*) *Vide post*, 314. (*a*).
(*c*) 1 *Lev.* 127.
(*d*) 1 *Salk.* 316.

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as an assignee for the rent incurred after his entry in the *debet* and *detinet*, and if the rent be of less value than the lands, as the law *primâ facie* supposes, so much of the profits as suffices to make up the rent, is appropriated to the lessor, and cannot be applied to any thing else; and, therefore, in such case the defendant cannot plead *plene administravit*, for that confesses a misapplication; since no other payment out of the profits can be justified till the rent be answered. On the other hand, if the rent be more worth than the land, the defendant may disclose that by special pleading, and pray judgment, whether he shall be charged otherwise than in the *detinet* only. *Quod Powell* J. *concessit.*" The cases certainly make a distinction, whether correctly or not, between the entry of an executor and the acting as executor.] The authorities which have been supposed to militate against the plaintiffs' case having now been examined, it will be proper to advert to those which are in their favour. In *Billinghurst* v. *Spearman* (*a*) it was held, that if an executor has a term, and the premises are of less value than the rent reserved, he may, in an action in the *debet* and *detinet*, plead the special matter, *videlicet*, that he has no assets, and that the land is of less value than the rent; because an executor cannot waive for the term only, for he must renounce the executorship *in toto*, or not at all. If an executor were not chargeable unless he entered, he might at his pleasure abstain from so doing. In *Howse* v. *Webster* (*b*) it was agreed, that if a man demises land by indenture to *J. D.* for years, yielding rent, and *J. D.* dies, making *A.* his executor, the lessor may have debt against the executor, for the rent reserved and in arrear after the death of the lessee, although the executor never entered or agreed; for the executor represents the person of the testator, and the testator by

(*a*) 1 *Salk.* 297. (*b*) *Yelv.* 103.

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the indenture was estopped and concluded duri
term to pay the rent upon his own contract; and
fore, although the rent was higher than the profit
land, yet the executor cannot waive the land; bu
withstanding that, he shall be charged with th
Yelverton is a reporter of very high authority. [M
There, the executor was charged *de bonis testatori*
Prattle v. *King* (*a*) it was held that executors cou
waive a term, though, if they could, they ought t
it specially, for it is naturally in them, and *prim*
is intended to be of more value than the rent.
should fall out to be otherwise, the executors sh
be liable *de bonis propriis*, but must aid themse
special pleading. An *interesse termini* is an est
some purposes; *Saffyn's* case. (*b*) [*Maule* J. S
a bequest of the term, and the executor assents,
the legatee be liable before entry?] In that
is conceived that the rule would be the s
in *Williams* v. *Bosanquet*. In *Com. Dig. Admi*
tion, (B. 10.), it is said that if the testator had
for years, this vests in the executor or admini
and he cannot refuse it, though it is worth nothi
Reed v. *Lord Tenterden* (*c*), not reported up
point, *Bayley* B., on *Sackville* v. *Evans* being cite
mated that it had been overruled by *Williams* v.
quet. (*d*) The defendant ought to have refused
ecutorship of the original testator, which she
might have done. See *Appendix to the Report*
Commissioners of Real Property, p. 43. By the p
of rent *Henry Hakewill* constructively entered.
dal C. J. The payment of rent is no taking
esplees.] Undoubtedly he dealt with the es
paying the rent. The defendant does not renou

(*a*) 1 *Mod.* 185.
(*b*) 5 *Co. Rep.* 124. *b.*
(*c*) 4 *Tyrwh.* 111.
(*d*) *Ex relatione E*
liams.

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executorship so far as regards this estate. There is no statement of an entry in the declaration; and if the omission of that allegation makes the declaration erroneous, the remedy of the defendant is, by motion in arrest of judgment, or by writ of error. The issue is, whether she was assignee; and, instead of traversing that averment, she might have pleaded specially. [*Tindal* C. J. Must not such a plea have concluded with a general traverse, *absque hoc* that she was assignee?] If the defendant be an ordinary assignee, *Williams* v. *Bosanquet* shews that she is liable; if she be not such an assignee, she ought to have pleaded specially, and not to have pleaded, — as she has done, — that she is not an assignee in any sense. She should have pleaded that she was only assignee *sub modo*, concluding with a verification. She is in this dilemma: an executor is liable as assignee if he deal with the term; but if he acts at all in the capacity of executor, he does deal with the term. An executor suffers no hardship, because he may always plead specially the real value, with an averment that he has no assets.

The next point is, whether the evidence of *Charlotte Thick* was admissible. It is submitted that it was; but, supposing she was not a disinterested witness, the objection was taken too late. [*Maule* J. If the objection had been taken on the *voir dire* it would in all probability have been answered by her stating that her father had assigned over to *Papworth* before the cause of action accrued.] She was called, in the first instance, to account for the non-production of certain deeds without being objected to; and it was not until she was called back into the box for another purpose that the point was taken. The rule is clear that the objection must be taken in the first instance, unless in the course of the trial something is elicited which for the first time discloses the incompetency. *Hartshorne*

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v. *Watson* (*a*) is an authority to shew that here objection was taken too late.

With respect to the memorials, it has been hel many cases, that a party taking property under assignment is bound by declarations made by the signor and the previous holders of such property. defendant having had notice to produce the indentu 5th *June* 1804, the memorial signed by *Papworth* admissible against persons in privity with *H. Hake* and obviated the necessity of producing the deed. the plaintiff had proved a parol admission, by *Papw* that he took the premises from *Thick*, it would been sufficient. (*b*) Presumptive evidence of assignm is sufficient without deducing the title through all it termediate stages. See *Earl dem. Goodwin* v. *Baxte* *Collins* v. *Maule*. (*d*)

Bompas Serjt. and *R. V. Richards* in support o rule. With respect to the first point, whether th denture of *June* 1804 amounted to an underlease not to an assignment, it is said that when a has parted with all his interest he cannot dis though he can do so if he retains a single day. is a purely technical rule. It is clear that befor statute of quia emptores, there was no pretence for rule; a seigniory without a reversion was sufficien But that statute affects freehold interests only. *Peter* v. *Edwards* the words were "*assign*, tra and set over," which distinguishes that case from present. *Parmenter* v. *Webber* (*g*) is admitted to b strongest case against the defendant. There, how the question was between the immediate parties t instrument. In *Poultney* v. *Holmes* (*h*), it was

(*a*) 5 *N. C.* 477., 7 *Scott*, 493.
(*b*) 1 *Phill. Evid.* 217.
(*c*) 2 *W. Bla.* 1228.
(*d*) 8 *Carr. & Payne*, 502.
(*e*) Seigniory implying sibility of *reverter*.
(*g*) 8 *Taunt.* 593., *Moore*, 656.
(*h*) 1 *Stra.* 405.

that if a lessee reserves the rent to himself, or grants over, it is an underlease, and not an assignment, although it be for the whole term. *Preece* v. *Corrie* (*a*) and *Baker* v. *Gostling* (*b*) are to the same effect; and see note in 5 *Mann. & Ryl.* 158. 162., in which the several cases are examined. *Burton* v. *Barclay* (*c*), *Bac. Abr. Leases* (I. 3); *Bailiffs &c. of Ipswich* v. *Martin.* (*d*)

The next and principal question is, whether the executor of an assignee of a term can, before he enters or receives rent, be charged as assignee of such term. As a general proposition, it is clear that an executor is only liable in respect of assets which have come to his hands. *Comyns's Digest, Assets* (D.). If an executor does not do his duty in collecting the testator's debts, he may be liable to a *devastavit*. See *Com. Dig. Administrator* (I.). It never seems to have been surmised, before the case of *Nation* v. *Tozer* (*e*), that an executor who had not entered upon the demised premises, or done some equivalent act, was to be held personally liable; and even there the point was not decided, but was merely thrown out as a suggestion. If the distinction which exists between an assignee in his own right and an assignee as executor be clearly borne in mind, it will reconcile many of the cases. In 1 *Rol. Abr.* 603. pl. 10. (*g*) it is said — "In an action of debt against an executor for the arrears of a rent reserved upon a lease for years, and incurred after the death of the testator, the writ shall be in the *debet* and *detinet*, because the executor is "charged of his own possession" (*h*); the meaning of which is, that he is not to be

(*a*) 5 *Bingh.* 24., 2 *M. & P.* 57.

(*b*) 1 *New Cases*, 19., 4 *Mo. & Sc.* 599.

(*c*) 7 *Bingh.* 545., 5 *M. & P.* 785.

(*d*) *Cro. Jac.* 411.

(*e*) 4 *Tyrwh.* 561. 565., 1 *Cro. M. & R.* 176.

(*g*) 7 *Vin. Abr.* 360.

(*h*) The judgment appears to have been reversed in *Cam. Scacc.*; but the ground of the reversal appears to impugn, not

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charged except he is so possessed. In *Helier* v. C *bert* (*a*) it is not stated whether the administrator tered; but the judges clearly seemed to have thou that, in order to charge him in the *debet* and *detine* must have had perception of the profits. In *Sackvi Evans* (*b*) it is said, that although an administrato executor, after the death of the intestate or test may waive the term, and then they shall be charge no further than they have assets, yet if they do po the term, they shall be chargeable for the rent *de propriis*, if it incurs in their own time. In *Boult Canon* (*c*) *Hale* C. J. lays it down, that when a lesse years dies, and his executor *enters*, it is in the ele of the lessor to charge him in the *detinet* only, or as he takes the profits, (and is, as it were, an *assig* in the *debet* and *detinet*. *Buckley* v. *Pirk* (*d*) shews, if an executor do not enter, he cannot be charge an assignee at all, and that if he does enter, he plead that the rent exceeds the value of the [*Maule* J. That case is qualified, as to the latter position, by *Rubery* v. *Stevens*.] The same doctrine laid down in *Billinghurst* v. *Speerman* (*e*), wher would appear, that the executor had entered and ceived profits. *Howse* v. *Webster* (*g*), when exami does not support the view taken on the other side. the case from the *Year-book* of *Henry* VI. (*h*) it is

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the principle of the decision in B. R., but the application of that principle in the particular case.

(*a*) 1 *Lev.* 127.
(*b*) *Freem.* 171.
(*c*) *Ib.* 337., 1 *Ventr.* 271., *Pollexfen*, 125.
(*d*) 1 *Salk.* 317.
(*e*) *Ib.* 297.
(*g*) *Yelverton*, 103.
(*h*) *Alice* —— v. *Thomas* ——, *H.* 21 *H.* 6, fo. 24, That was an action by writ *in vitâ*, in the course of it was said by *Ascue* (or *cough*) J., "Suppose a lea made to a man and his for the term of their two and the husband dies, an wife holds herself in and cupies the land, she sha charged with the waste do the husband; but if she w

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that the executor shall be charged with rent if he enters, but shall not be charged if he does not enter, without saying that he shall not be charged *de bonis propriis*. *House* v. *Webster* overrules it as to that, and decides that the executor entering shall be personally liable for rent and arrears; and properly so; for the latter part of the position in the *Year-book*, in the unqualified form in which it is stated, is not good law. [*Stephen* Serjt. Wager of law did not lie in an action of debt for rent, the contract, though not under seal, being considered in the nature of a specialty. (*a*)] In the last edition of *Wms. Saunders*, in 1824, the learned editors, in their note to *Jevens* v. *Harridge*, appear to be clearly of opinion that an executor is not chargeable *de bonis propriis* unless he enter. [*Maule* J. That note was written before *Rubery* v. *Stevens* had been decided; and *Williams* v. *Bosanquet* is not referred to. (*b*)] In *Williams* v. *Bosanquet* it is expressly stated that the defendants *accepted* the mortgage conveyance. The decision, therefore, amounts to no more than this — that a party who *assents* to the transfer of an estate to himself, is liable without entry. *Remnant* v. *Bremridge* (*c* shews that in order to charge an executor personally, it is necessary that he should enter. It does not appear, in the report of *Tilney* v. *Norris*, in *Lord Raymond* (*d*), that the defendant entered;

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the possession and occupies (*quære*, does not occupy) after the death of the husband, she shall be discharged of the action of waste. And the same law is, if I let land to *Markham* (Serjeant) for ten years, rendering to me 4*s*. rent per annum, and the rent is in arrear for three or four years, and *Markham* makes his executors and dies, and, within the term, his executors occupy the land, they shall be charged with the rent *and the arrears*; and if they waive the possession, they shall not be charged with the rent or with the arrears."

(*a*) See Vol. II. 432. (*a*)

(*b*) It is, however, cited afterwards; see 1 *Wms. Saund.* 203. (*b*)

(*c*) 8 *Taunt.* 191., 2 *B. Moore*, 94.; where the occupation having been wholly unproductive, the defendant although he had entered, was held not liable.

(*d*) 1 *Ld. Raym.* 553.

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but in *Carthew* (*a*) it is distinctly stated, that the
fendant "entered and was possessed." In *Rube*
Stevens, the court appear to have considered an e
necessary to charge the executor personally. It is t
said that "the executor of a termor cannot waive
term, but must either renounce or accept the execu
ship *in toto*," and that "if he accept the executor
and *enter* upon the demised premises, he is charge
as assignee, in an action of debt or covenant, for
arrears of rent due after his *entry*, *de bonis propr*
The defendant here being the executrix of an execu
the question is placed in the strongest possible l
She has, at most, only accepted the term as execu
and she should be charged in that character alone.
acceptance of probate is an acceptance of a liability to
form certain duties. Can it be said that if an old ter
hunted out, in which the executor takes the legal es
such executor is to be liable to the payment of the
and the performance of the covenants contained in
lease? All other contracts and liabilities descend o
executor in a representative capacity, why should
otherwise with respect to leases? The most serious
sequences would follow if it were held that an exec
who does not enter, is liable upon all covenants run
with the land. He would continue liable in respect of
covenants, except on that for the payment of rent, alth
the premises should have been utterly unproduc
An executor, when he obtains probate, cannot be
sumed to have the means of knowing the covenants or
contracts into which the testator may have entere

(*a*) P. 519.

(*b*) But in *T.* 4 *H.* 7, fo. 15 *b.*, it it is said by *Hussey* C. J. of K. B. "That an executor is *not* bound to take notice of a debt of the testator, unless it be a debt recovered in a court of record, and then he shall take notice, as is adj*anno* 4 *H.* 6." *Acc. Lit* v. *Hibbins*, *Cro. El.* 793. see *Bac. Abr.* tit. *Exec* (L. 3.) pp. 82, 83. n.

The second edition of the *Books*, by omitting the "*ne*," makes it "is boun

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On the other hand, the lessor has all that he bargained for—the liability of the lessee and of his personal representative. In all the old cases it will be found, that where the executor is charged in the *debet* and *detinet*, he has entered; and it is singular that now, for the first time, an attempt should be made to charge a personal representative, *de bonis propriis*, without entry.

Charlotte Thick was clearly not a competent witness, being the personal representative of *William Thick*, under whom the defendant's first testator *Papworth* claimed. She was called to prove, amongst other things, that *H. Hakewill* had paid rent to her father and to herself subsequently to her father's death. By fixing the defendant, *Charlotte Thick* was, in effect, discharging herself from her liability as the personal representative of her father, in respect of the covenants in the original lease. It is submitted, therefore, that she had a direct interest in the event of the suit; *Bland* v. *Ansley* (*a*), *M'Brain* v. *Fortune* (*b*), *Repley* v. *Thompson* (*c*); and that the objection is not removed by the 3 & 4 *W.* 4. *c.* 42. *s.* 23. *Hartshorne* v. *Watson* (*d*) shews that she was an incompetent witness.

With respect to the period at which the objection was taken, the answer is, that the proper time for so doing was, when the witness was recalled for the purpose of proving the payment of rent by *H. Hakewill*. Previously to that time it did not appear that the witness was interested.

It is said that the memorial of the deed of the 5th of *June* 1804, signed by *Papworth*, is evidence against the defendant, as being an admission by a person under whom she derives her title. It is submitted, that the defendant does not claim under *Papworth*, in any sense

(*a*) 2 *New Rep.* 331.
(*b*) 3 *Campb.* 317.
(*c*) 12 *B. Moore*, 55.
(*d*) 5 *New Cases*, 477., 7 *Scott*, 493.

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which should bind her by his statements. The de
ant, far from claiming the term, repudiates it. [
dal C. J. I do not see how you can say that you d
claim under *Papworth*, unless you can maintai
proposition that the defendant might waive the
Maule J. Suppose you are wrong in saying tha
are not assignee of the term, — will you not be bou
Papworth's admissions?] Here, the plaintiffs are e
vouring to fasten a liability on the defendant
representative of *Papworth*, and in order to
her responsible, it is assumed that she claims
Papworth for the purpose of letting in evidence
declarations. [*Bosanquet* J. For the purpose of
the point, it must be assumed that you are assig
and that, without taking possession, your assent to t
cutorship makes you such assignee. (*a*) *Tindal* C.
you had been in possession, you admit that *Pap*
declarations would have been evidence. (*b*)] *
Shelton v. *Shelton*. (*c*)

TINDAL C. J. now delivered the judgment
court.

The plaintiffs declared in this case on certain

(*a*) It would be necessary to assume that *if Papworth* was assignee, *the defendant would be liable in the present action*, as otherwise the evidence to fix *Papworth* as assignee would be immaterial; but it seems to be far from necessary to assume that *Papworth was* assignee for the purpose of raising the question, whether a particular piece of evidence was admissible for the very purpose of shewing him to have been such assignee.

(*b*) The declarations of *Papworth* were offered in evidence for the purpose of shew
the *defendant* was assig
cause *Papworth*, whom
presents, was assignee.
had been shewn to be
facie an assignee by taki
session, she would not h
mitted herself assignee
any particular course
signment. She might, i
seem, well call for pr
Papworth was an assig
fore she should be concl
his admissions.

(*c*) 3 *A. & E.* 265.,
M. 857.

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nants contained in an indenture of lease, made by one *Haygarth* to one *Stead*, of certain premises, to hold from *Midsummer* 1786 for ninety-nine years, deducing their title to the reversion from the lessor by various mesne assignments, and alleging that "all the estate, &c. of *Stead* of and in a *great part* of the demised premises, with the appurtenances, situate and being on the back part thereof, by assignment thereof then made, came to and vested in the defendant; whereupon and whereby the defendant became and was possessed of the said part of the demised premises, and continued so possessed until the commencement of this suit. The plaintiffs then proceeded to assign a breach of covenant in the nonpayment of certain additional rents reserved by the lease (*a*), and also a breach of covenant in not keeping such part of the premises in repair.

The defendant, by her plea, traversed the allegation "that all the estate, &c. of *Stead* of and in *the said part* of the demised premises, by assignment thereof made, came to, and vested in, her, in manner and form," &c. Issue thereon.

Upon the trial, before my brother *Coltman*, at *Westminster*, a verdict was taken for the plaintiffs for the sum of 26*l.* 5*s.*, with leave to the defendant to move to set it aside and to enter a nonsuit; and certain objections having been taken at the trial as to the admissi-

(*a*) In the ordinary case of an assignment of the term in part of the lands demised, an apportionment of the rent or rents would be necessary; for although the lessor might, notwithstanding the severance, sue the lessee or his personal representative for the whole rent, or distrain for it upon any part of the demised premises, yet in covenant or debt against the assignee of the term in *part* of the demised premises, such an assignee can be charged only *pro ratâ*. *Gamon* v. *Vernon*, 2 *Lev.* 231., Sir *T. Jones*, 164.; and see *Coote, Landlord and Tenant*, 261. Here, however, the rent sued for being rent reserved specially with reference to that part of the demised premises, in respect of which the defendant was sought to be charged as assignee, no apportionment was required.

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bility of evidence there given, the rule was dra to shew cause why a nonsuit should not be enter new trial had.

The motion for a nonsuit rested on two grou first, on an alleged variance between the allega the declaration, — charging the defendant gene assignee of the lease, — and the proof offered at t whereby it appeared that she was only executrix executor of an assignee, and that she had never or taken the profits. Secondly, that the docume duced at the trial, independently of certain ob urged against their reception, did not prove t person to whose executor the defendant was ex was assignee of the *whole* term.

The first objection is, in substance, an objecti variance between the allegation in the declarat the proof of the character in which the defe charged. That the executrix, if she had *enter* had by such *entry* become possessed, might ha charged as assignee of the term, generally, for bre covenant after the testator's death (*a*), is admitte defendant; and, indeed, the case of *Jevens* v *ridge* (*b*), and the cases there cited in note (1.), ently establish that proposition; and it is equa established, by the same authority, that where t cutor does not enter and take possession, he is able for the breaches of covenant which happ his testator's death, in his character of executor o is liable no otherwise than in respect of the asse have come to his hands to be administered. question raised by the present objection does n upon the extent to which, or the character in w executor is chargeable, but is strictly and prope — whether the charging the defendant in the

(*a*) *Vide, antè*, p. 315 n. (*b*) 1 *Wms. Sau*

case, *as assignee*, constitutes a variance between the allegation and the proof; and we are of opinion there is no variance. That the whole term vests in the personal representative of the lessee, on his death, there can be no doubt; the executor is the assignee, in law, of the term, according to the known distinction between assigns in law and assigns in fact. Such is the doctrine laid down in *5 Co. Rep.* 17 *b.*, viz. "That the assignee of the assignee should have an action of covenant. So, of the executors of the assignee of the assignee. So, of the assignee of the executor or administrator of every assignee; for all are comprised within this word *assignees*; for the same right which was in the testator or intestate, shall go to his executors or administrators." And, as to to the argument that the executor, by being charged generally as assignee, becomes liable *de bonis propriis*, the answer is, that he may, by proper pleading, discharge himself from personal liability, by alleging that he is no otherwise assignee than by being executor, and that he has never entered or taken possession of the demised premises; and, as is well known, from all liability as executor, by alleging that the term is of no value, and that he has fully administered all the assets which have come to his hands. If, however, instead of relieving himself by pleading, he takes issue upon the question whether he is assignee or not, we think the evidence that he is executor, and takes the term as executor, proves the affirmative of the issue that he takes the term by assignment. The precise point, however, has been determined in the Exchequer in *Ireland* in *Green's Assignee* v. *Earl of Listowell* (*a*); in which it was held, by *Pennefather* B. and *Foster* B., against *Richards* B., that

(*a*) *T. T.* 1840, 2 *Brady, Addir, and Moore's Irish Law Rep.* 384. That was an action against the personal representative of a *lessee*; here, the party sought to be charged was the personal representative of an *assignee*. *Vide post*, 325 n.

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the production of letters of administration taken
the defendant, without any proof of entry, sustai
allegation in the declaration, that all the estate a
terest of the lessee vested in the defendant by
ment. As well, therefore, upon the authority
case as for the reasons before given, we thi
objection falls to the ground.

Upon the second objection urged as a gro
nonsuit, the facts at the trial stood thus: — *Ha*
demises by indenture to *Stead* a piece of ground
years, commencing at *Midsummer* 1786, which te
successive assignments, becomes vested in *William*
Thick, by indenture of lease bearing date the 5th
1804, demises to *Papworth*, part only of the p
contained in the lease to *Stead*, to hold to *Papwo*
99 years from the 29th of *September* 1787, at th
of 21*l.* per annum. The defendant is the perso
presentative of *Papworth*; and the objection ta
that *Papworth* held under a *lease* from *Thick* for
longer than that which was originally granted to
and that he held *part* of the premises only, and
increased rent; under which circumstances it was
that *Papworth* himself could not be an assignee
as to the assignment being of *part* of the premis
and not of the *whole*, we see no objection on that g
for, on the one hand, the assignee of part is
to an action on every covenant running with th
and affecting such part, *Comyns's Digest*, tit. *C*
(C. 3.), and, on the other, there can be no v
upon that ground in the present case, for the de
is charged in the declaration as assignee of par
and the issue is raised thereon; and as to the r
served upon the lease to *Papworth* exceeding
the original lease to *Stead*, the excess of the re
yond that originally reserved, may be a *rent-sec*
but there is no ground for holding that the tra

the whole term will not, upon that account, be an assignment. The only question, therefore, is, whether, if lessee for 99 years, demises for a longer term, such demise operates in law as an assignment; and we entertain no doubt but that for a very long period, the law has been held that it has such operation, and may be so treated in pleading. The resolution of the court in *Hicks* v. *Downing* (*a*) is in point; "So, if lessee for three years assigns his term for four years, or demises the house for four years, he does not by this gain any tortious reversion, and it does but amount to an *assignment* of his interest." (*b*) *Parmenter* v. *Webber*. (*c*) We therefore see no ground for a nonsuit.

But two objections have been taken against the admissibility of the evidence offered at the trial. The first objection is, that *Charlotte Thick* was not a competent witness. (*d*) The other is, that the memorial of the indenture of assignment from *William Thick* to *Papworth* was, under the circumstances, inadmissible.

As to the first point, *C. Thick* was the personal representative of *W. Thick* her father, the probate of whose will she produced. She was called, amongst other things, to prove that her father, received rent from *H. Hakewill*, to whom *Papworth* had bequeathed the lease, and that since her father's death, in 1830, she had herself received the rent from *H. Hakewill*. The objection taken was, that the executrix of the assignor of the lease

(*a*) 1 *Ld. Raym.* 99.

(*b*) This point did not arise in the case, and is merely introduced, by way of illustration, to shew that no interest is gained in the hypothetical *fourth* year, *antè*, 303 (*b*). It is not noticed in the report of this case in 1 *Salk.* 13. or 12 *Mod.* 100. In the record, transcribed at length in 2 *Salk.* 724., 3 *Ld. Raym.* 236., it is alleged that the plaintiff, being tenant "for a certain term of years," demised to the defendant for three years, if four persons should so long (jointly) live, *the reversion thereof belonging to the plaintiff.*

(*c*) 8 *Taunt.* 593., 2 *B. Moore*, 656.

(*d*) *Vide post*, 326.

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could not be called to prove that the defendant v signee, and thereby to remove her own liability payment of the rent. Assuming, but not admittin objection to be well founded, it is clear that it ou have been taken in the first instance upon the vo in which case the witness against whom the ob was made might have removed it by her answer, t father had assigned over to *Papworth* before the b of covenant had been committed for which this acti brought; in which case the executrix of a former a could not, in any point of view, be liable; and, in ness, such objection ought not to be allowed a witness has been examined without objection, a called for another purpose. But in the present in where it is manifest from the evidence that such case, and that, if asked the question, she must hav that answer and shewn her competency, we th ought not to yield to the objection when the op party has waived the proper time and manner by law for raising it. (*a*)

And if *Charlotte Thick*'s evidence is admitted, an end to the only remaining objection, which the production of the memorial of the assignme *Thick* to *Papworth*; for when *H. Hakewill*, w the executor of *Papworth*, is proved to have b possession, by the payment of rent from him to the memorial of the assignment from *Thick* t *worth*, which is proved to have been signed b *worth*, is evidence against *Papworth* and those c under him, and with the evidence of the survey other witnesses identifying the premises descr that assignment as part of those which were dem *Stead*, establishes the affirmative of the issue, t defendant took by assignment from *Stead*.

(*a*) And see *Yardley* v. *Arnold*, 10 *M.* & *W.* 141

For these reasons we think the several objections raised upon this rule have been answered, and that the rule must be discharged.

Rule discharged. (*a*)

(a) In *Smallpiece* v. *Evans*, 1 *Anders.* 123., "*Thomas Smallpiece* sued *ejectione firmæ*, by bill, in the Common Place against *Henry Evans*, an attorney; to which the defendant pleaded not guilty; and, upon evidence given, it was demurred. The case was this, viz. That one *William More*, Knight, by his indenture, demised the tenements to *Richard Ferrant* for twenty-one years, upon condition that the said *Ferrant*, his executors, &c., should not demise, assign, set over, or put away their estate or interest, or any part thereof, to any person or persons, without the consent of *More* in writing. *Ferrant* died intestate; administration was committed to *Anne*, &c., who entered and granted all the said estate to *Evans*. Upon which the question was, if, by this assignment, the interest was forfeited or not; for if so, then is the defendant guilty of the ejectment. And it was adjudged against the defendant. For three of the justices held that the administratrix was *assignee* of *Ferrant*, and thus the condition in words and intent broken; as to which (*a que*) it was held by the other judge of the Place, that she was not assignee; and he granted (or granting, *et grant*) that an executor is an assignee, as all the others held; the reason of which is, because he is made executor by the act of the party; and always where one is assignee, one has the thing assigned by the act of him who made him assignee; but in this case, the administratrix does not administer by assignment or appointment of him who died intestate, nor has any thing by his act or consent." "It was doubted whether, if out of the words of the condition, it was within the intent of the condition; which point was not discussed, because the law was held upon the other point as before. But, *semble*, that this last point has in it more appearance of proving forfeiture than the first point; for it was not the intent of the condition that the lessee should have the liberty by dying intestate, to destroy the condition. Therefore it shall be within the intent, *quære*. And *quære* also if the administratrix was *assignee* of *Ferrant*, so that, by the administration committed, the lease should be forfeited; or if he had made an executor who proved the will &c., and entered into the lease, if that should be a forfeiture; and it seems not; for neither one nor the other were *assigns of the interest;* but the one, to administer the goods, by assignment from the ordinary, and the other, to execute the will, by the appointment of the testator."

In *Green's Assignee* v. *Earl of Listowell* (*antè*, 321.), it was said by *Pennefather* B., "An administrator, by taking out administration, assents to take the entire of the property of the intestate which the law gives him

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a right to; and he who does so assents to take each and every term of which his intestate was possessed, and he cannot divest himself of it."

Foster B. says, "There are authorities to support the application of the principle to the present case; one a very old, the other a very recent one, *Paule* v. *Moodie*, 2 *Roll. Rep.* 131., and *Rubery* v. *Stevens*, 4 *B. & Ad.* 241., 1 *N. & M.* 182. It is impossible to distinguish this case from either of those cases."

Paule v. *Moodie* was an action of debt for rent against *Moodie* and his wife, who was executrix of an assignee of the lessee. The defendants pleaded, that after the death of the testator they never entered, but relinquished the possession and took no profits thereof; upon which the plaintiff demurred. The justices agreed that "an executor cannot waive the term and lease, but notwithstanding such waiver he shall be charged with the rent;" and *Haughton* J. said, when he agrees to be executor, which is the principal thing, then he agrees to all accessories. *Dodridge* J. said, can the executor waive that which the testator has accepted? *quasi diceret* that he cannot. *Haughton* J. He cannot accept to be executor in part, and disagree to be executor for other part; but, admitting that he might waive this term, he ought to give notice to the lessor of the waiver; and also, if the law will permit him to waive the lease, then he might by this means occupy the land and take the profits until the day before the rent became due, and then waive it, which
be mischievous to the
And *Dodridge* and *Ha*
JJ. held that *plene ad*
travit is not (would not
been) a good plea, becaus
are (*il est*) charged of
(*son*) own possession.
Montague C. J. held t
the rent were more tha
land is worth, the ex
might have pleaded it;
such special case, by his
of the term and lease, he
have discharged himself
rent.

After this intimation
opinion of the court, *B*
man (of counsel with t
fendants,) prayed a day t
the reversal of the judgm
Hargrave's case, 5 *Co. R*
which had been cited
argument by *Damport*,
plaintiff. The court sai
if he did not shew the
of the case so reversed,
ment should be given f
plaintiff. The judgme
reversed (*antè*, 306.); bu
became of *Paule* v. *Mood*
not appear. In the re
Rolle no judgment is
Foster B. appears to ha
sumed that as *Bridgema*
not the record of the ju
of reversal, the judges
attention to his represen
whether well or ill found

In the other case relie
by the two barons, *Rub*
Stevens, it was merely
that executors of a less
chargeable as assigns, fo
part of the rent as the
tion is worth; and that,
do not enter, they are cha
merely in respect of any
of the rent above the valu
that in the *detinet* only.

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BY a decretal order of Lord *Langdale*, M. R., bearing date the 6th of *August* 1838, made in several causes between the parties hereinafter mentioned, A testator, after giving certain specific and pecuniary legacies, devised all the residue of his real and personal estate and effects to trustees, upon trust in the first place to let and manage the same until his son *James* should attain the age of twenty-one or die under that age; and in the meantime to pay and apply so much of the rents, &c. as they should think proper in the maintenance and education of his sons and daughter *William*, *Joseph*, *James*, and *Elizabeth*, and of all and every other the child or children of his body lawfully begotten, who should be living at his decease or born in due time afterwards, until they should respectively attain the age of twenty-one years. After giving the annual sum of 100*l.* each to *William*, *Joseph*, and *Elizabeth*, to be paid to them from the time they should respectively attain twenty-one or marry, until *James* should attain twenty-one or die under that age, he proceeded as follows: — "And from and immediately after my said son *James* shall have attained the age of twenty-one years or die under that age, then as to the said messuages, &c., and all and every the premises of the nature of freehold or leasehold, to the use and behoof of my said sons and daughter, *William*, *Joseph*, *James*, and *Elizabeth*, and of all and every other the child or children of my body lawfully begotten who shall be then living, and their several and respective heirs, executors, administrators, and assigns, for ever, or for and during all my estate term and terms of years and interest therein respectively, as *tenants in common*, and not as joint-tenants, in the shares and proportions following; that is to say, in case there shall happen sons and daughters, or a son and daughters, or sons and a daughter then living, then to the use and behoof of all and every such children (as the case may happen), *in proportion of two shares to each son, and one share to each daughter*, and to their several and respective heirs and assigns for ever, for and during all my estate &c. therein, as *tenants in common*, and not as joint-tenants; but in case there shall not happen to be any daughter then living, then to the use and behoof of all and every the sons in equal proportions, and to their several and respective heirs, &c. for ever, or for and during all my estate, &c. therein, as *tenants in common*, and not as joint-tenants. And in case there shall not happen to be any of my sons then living, to the use and behoof of all and every of my daughters who shall be then living, in equal shares and proportions, and their several and respective heirs, &c. for ever, and for and during all my estate, &c. therein, as *tenants in common*, and not as joint-tenants, the annual income of such as shall be under age to be applied in their maintenance. And *in case any of my children shall happen to die either before or after my said son James shall attain the age of twenty-one years, or die under that age, leaving issue of his or her body living, then the share or shares of him or her so dying, whether a son or daughter, according to the proportions aforesaid, shall be*

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tioned (*a*), the following case was directed to b
mitted for the opinion of this court upon the qu
thereto subjoined: —

Joseph Lees, late of *Clarksfield*, in the county o
caster, gentleman, by his will, bearing date the 1

---

and enure to the use and behoof of the issue of such of them so dying, for
for and during all my then estate, &c. therein respectively. And in case
my children shall die *under the age of twenty-one years*, either before
my said son *James* shall attain the age of twenty-one years, or die und
age, and *without leaving lawful issue*, then the share of him or her so
whether son or daughter, shall be and enure to and to the use for ever
survivors and survivor of them, their heirs, executors, &c., in the same
tions as their original share and shares. And in case *all* and every
child or children shall happen to die *under the age of twenty-one yea*
without leaving lawful issue, then to the use and behoof of my nephe
nieces, and their several and respective heirs, &c. for ever, and for and
all my then estate, &c. therein respectively, to hold as *tenants in comm*
not as joint-tenants, in the same shares and proportions, with respect t
and females, and with the same preference to males, and with the same
tions to the issue of any of them happening to die leaving issue then li
is hereinbefore by me limited and apportioned of and concerning my o
and daughters:" with an ultimate limitation to the right heirs and nex
of the testator.

And as to all the residue and remainder of the *moneys* arising from t
property, rents, profits, and accumulations undisposed of, the testator
the trustees, as soon as his said son *James* should have attained the
twenty-one years, or should die under that age, to pay, assign, transfer,
liver the same unto and amongst all and every his children who should
living, in the same shares and proportions, with respect of boys and gi

(*a*) The first suit was between *James Radley*, now deceased, and *Elizabeth* his wife, plaintiffs; and *James Lees*, *Edward Brown*, *John Lees*, the nephew, and *William Lees*, the son of *William Lees*, deceased, and *Elizabeth Lees*, now deceased, infants, by *Ann Lees* their guardian; and *Catherine Lees*, widow of *William Lees* (the son of *Joseph Lees* the younger, deceased), an infant, by the said *Catherine Lees*, his guardian; and *Hannah Lees*, *John Lees* the younger, *David Lees*, *Sarah Ann Lee* *Esther Lees*, infants, said *Ann Lees*, their gu defendants.

The second, between *beth Radley*, plaintiff, an *Lees* and *William Le* son of *William Lees*, dec *Sophia Lees*, *Joseph* *Samuel Radley*, *Sophia* *Mary Ann Radley*, and *Radley*, defendants.

And the third, betwe said *Elizabeth Radley*, tiff, and *Joseph Lees*, ant.

May 1817, and duly executed and attested for the passing of real estates, (after directing the payment of his debts and funeral and testamentary expenses, which he charged on his real and personal estate, and giving several specific and pecuniary legacies to his wife, and to his

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with the same preference to boys, as was thereinbefore by him directed and declared of and concerning the division of his real estates as aforesaid. And in case any of his said children should be then dead, leaving issue then living, then the issue of such of them dying should have, and be entitled to, the share and proportion of the parent or parents so dying, with a similar limitation as in the case of the freeholds and leaseholds in favour of his nephews and nieces in the event of all the testator's children dying under twenty-one and unmarried.

The testator's son *James* attained the age of twenty-one, and his son *William* died, leaving issue a son and daughter, in the testator's lifetime. Shortly before his death, the testator made a codicil to his will, in which he stated that by his will the children of *William* would, amongst them, be entitled to an equal share with his other sons. At his death the testator had four sons and four daughters living.

Held, first, that under the will and codicil, the children of the testator living at his death, took an estate in fee in six sevenths of the freehold, and the whole interest in six sevenths of the leaseholds, as tenants in common, in the proportion, as regarded males and females, appointed by the will in favour of males, with an executory devise, in the event of the death of any of the said children leaving issue, of the share of each such child so dying to the issue of such child, as *joint-tenants* in fee, in *equal shares*; and with an executory devise in the event of the death of any of the said children under the age of twenty-one, without leaving issue, of the share of each such child so dying as last aforesaid, to the surviving children of the testator as *joint-tenants* in fee, in the like proportions, as regarded males and females, as was provided with respect to the original shares; and that the children of the testator's son *William* took an estate in fee in one seventh of the *freehold*, and the whole interest in the one seventh of the *leaseholds*, *as joint-tenants*, in equal shares.

Secondly, that the estates and interests of the testator's children living at his death (with the exception of such as took effect by way of executory devise), and the estates and interests of the children of his deceased son *William*, vested in them on the testator's death; that the executory interests of the issue of such of the children of the testator as were living at the death of the testator, vested in such issue respectively upon the death of their parent; and that the executory interests to arise to the surviving children of the testator on the death of any of the children of the testator without leaving issue, vested in them respectively on the death of such children without leaving issue.

Thirdly, that the children of the testator living at the time of his death, took six sevenths of the residuary personal property of the testator, consisting of moneys arising from the trust property, rents, profits, and accumulations undisposed of, absolutely, as *tenants in common*, in the proportions before mentioned; and that the children of *William* took one seventh of the same residuary personal property absolutely as *joint-tenants*, in equal proportions.

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nephews and nieces, and also to other parties) gave devised as follows: —

"And as to, for, or concerning all the rest, res and remainder of my messuages or dwelling-ho lands, tenements, collieries or coal works, mines, shares of mines, and all other my *freehold and leas* hereditaments whatsoever, and of whatsoever na kind, or quality the same be, and wheresoever sit lying or being, and also all my real estates whatso and also all my stock in trade, ready money, debts, securities for money, goods, chattels, and personal e and effects whatsoever; I give, devise, and bequeath same, and every of them, and every part thereof, unt nephews *John Lees*, of *Fairfield*, in the said coun *Lancaster*, *John Lees Radley*, of *Hollins* within *Old* in the said county of *Lancaster*, *Charles Harrop*, of *cross* in *Saddleworth*, in the said county of *York*, *Edward Brown*, of *Dobcross*, aforesaid, their heirs, cutors, administrators, and assigns for ever, acco to the nature and quality of the same estates and mises respectively; upon the trusts, nevertheless, a and for the several uses, ends, intents, and purp hereinafter mentioned, expressed, and declared, of concerning the same respectively; that is to say; trust, that they, the said *John Lees*, &c., and the surv and survivor of them, and the heirs, executors, and ministrators of such survivor, do and shall set, let,

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Fourthly, that the widow of *William*, the testator's eldest son, took n terest in the same residuary property, either as widow or as administratrix estate and effects of her deceased daughter.

Joseph, the testator's eldest son by his second wife, (who survived his f and died leaving a son) by his will charged all and every his lands, &c., soever and wheresoever situate, with an annuity of 100*l.* to his widow in li dower. Held, that this annuity was not chargeable upon the share of *Jose* the freehold and leasehold lands so devised by the will and codicil of his f but that the same was chargeable upon his share in the residuary personal perty, rents, profits, and accumulations.

nd manage my said messuages or dwelling-houses, s, tenements, collieries or coal works, and all other roperty so given and devised to them upon trust as said, to the best advantage in their power; and do hall put and place out at interest the moneys arising the said residue of my personal estate, and the , issues, and profits of my real and personal estate, ect, nevertheless, as herein-mentioned, upon govern- t or real securities for and during and until my son es shall attain the age of twenty-one years or die er that age; and also do and shall from time to time e discretion of them the said *John Lees*, &c., or the ivors or survivor, &c., alter and change the securities r upon which the said trust moneys shall from time ime be invested; and do and shall receive the in- st, dividends, and annual produce of the said stocks, ls, and securities, and lay out and invest the same in pon stocks, funds, and securities of the like nature; do and shall in the meantime pay and apply so h of such rents, issues, interest, and profits as they e shall in their or his discretion think proper, in support, maintenance, and education of my sons and ghter, *William*, *Joseph*, *James*, and *Elizabeth*, and of nd every other the child or children of my body fully begotten, who shall be living at the time of my ase or born in due time afterwards, until they shall rally and respectively attain the age of twenty-one s; and as and when my said sons *William* and es, and my daughter *Elizabeth*, shall severally and essively attain the age of twenty-one years or be ried, then each and every of such sons and daughters pectively, upon his or her attainment to the age of nty-one years or marriage (which shall first happen), l be entitled to and shall have and receive from my trustees, until my said son *James* shall attain the age venty-one years or die under that age, the annual sum

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of 100*l.* to be paid out of the rents, issues, and p
and interest of my said real and personal estate,
and effects for their support and maintenance.
from and immediately after my said son *James*
have attained the age of twenty-one years or die
that age, then, as to and concerning all and eve
said messuages or dwelling-houses, lands, tene
and hereditaments, collieries or coal works, mine
shares of mines, and all and every the premises
nature of freehold or leasehold, with their and e
their appurtenances, to the use and behoof of m
sons and daughter, *William*, *Joseph*, *James*, and
beth, and of all and every other the child or child
my body lawfully begotten who shall be then livin
their several and respective heirs, executors, admi
tors, and assigns for ever, or for and during
estate, term, and terms of years and interest ther
spectively, as tenants in common, and not as joint-t
in the shares and proportions following, that is
in case there shall happen sons and daughters, o
and daughters, or sons and a daughter then livin
to the use and behoof of all and every such childr
the case may happen) in proportion of *two sh*
each son, and one share to each daughter, and t
several and respective heirs and assigns for ever,
during all my estate, right, term, and terms of yea
interest therein, as tenants in common, and not as
tenants; but in case there shall not happen to
daughter then living, then to the use and behoof
and every the sons in equal shares and proportio
to their several and respective heirs, executors, a
trators, and assigns for ever, or for and during
estate, right, term, and terms of years, and i
therein, as tenants in common, and not as joint-te
and in case there shall not happen to be any of m
then living, then, to the use and behoof of all and

y daughters who shall be then living, in equal shares proportions, and their several and respective heirs, utors, administrators, and assigns for ever, or for during all my estate, right, title, term, and terms ars and interest therein, as tenants in common, and s joint-tenants; the annual income of *such* as shall under age, to be applied to their maintenance. l in case any of my children shall happen to die, er before or after my said son *James* shall attain the of twenty-one years or die under that age, *leaving* of his or her body living, then the share or shares im or her so dying, whether a son or daughter, rding to the proportions aforesaid, shall be and re to the use and behoof of the issue of such of n so dying, for ever, or for and during all my then te, term and terms of years, and interest therein pectively. And in case any of my children shall *under the age of twenty-one years*, either before or r my said son *James* shall attain the age of twenty- years, or die under that age, and *without leaving ful issue*, then, the share of him, her, or them so ng, whether son or daughter, shall be and enure to, to the use for ever of, the survivors and survivor them, their heirs, executors, administrators, and gns, in the same proportion as their original share shares. And in case *all and every* my said child children shall happen to die *under the age of twenty- years and without leaving lawful issue*, then, to the and behoof of my nephews and nieces, children of late brother *John Lees*, and my brother *James Lees*, l my sisters *Mary Radley* and *Elizabeth Cresswell*, l their several and respective heirs, executors, ad- inistrators, and assigns, for ever, or for and during my then estate, right, term and terms of years and erest therein respectively, and according to the nature l quality thereof respectively, to hold as tenants in

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common and not as joint-tenants, in the same
and proportions, with respect of males and fe
and with the same preference to males, and wi
same limitations to the issue of any of them h
ing to die, leaving issue then living, as is l
before by me limited and apportioned of and co
ing my own sons and daughters. And in case
should not happen to be any of them, my said ne
and nieces, or issue of any of them then living, t
the use and behoof of my right heirs and next
for ever, according to the nature and quality
respectively. And as to, for, and concerning
residue and remainder of the moneys arising fr
said trust property, together with the rents and
of the said real estates, collieries and coal-work
terest of moneys, and accumulations of my pr
undisposed of, upon trust that they, my said t
and the survivors and survivor of them, and the
executors, and administrators of such survivor,
shall, as soon as my said son *James* shall have a
the age of twenty-one years, or die under th
which ever shall first happen, pay, assign, t
and deliver the same, and every part thereo
and amongst all and every my children who s
then living, in the same shares and proportion
respect of boys and girls, and with the same
ence to boys, as is hereinbefore by me direct
declared of and concerning the division of m
estates as aforesaid; and in case any of my c
shall be then dead, leaving issue then living, th
issue of such of them dying shall have and be
to the share and proportion of the parent or par
dying. And in case it shall happen that all an
of my said child or children shall happen to die
the age of twenty-one years and unmarried, then
further trust that they, the said trustees, and t

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and survivor of them, and the heirs, executors, ministrators of such survivor, do and shall pay, and dispose of the same last-mentioned trust ty, unto my said nephews and nieces, the children said brothers, *John Lees* and *James Lees*, and of ers, *Mary Radley* and *Elizabeth Cresswell*, in the hares and proportions with respect to males and s, and with the same preference or distinction to and with the same benefit to the issue of any of happening to die leaving issue then living, as is -before directed and appointed of and concerning n sons and daughters; and in case there shall not ı to be any of them, my said nephews or nieces, ıe of them then living, then upon further trust to ıd apply such last-mentioned trust property unto ɔerson and persons as shall then be the next of kin , and as would, according to the statute of distri- ıs, be entitled to my personal estate in case I had ınmarried and intestate. Provided, nevertheless, do hereby will and direct, that when and so soon son *William* shall attain the age of twenty-one or be married, he shall be paid or allowed by my rustees, for his own exclusive use and benefit, 10*l.* ntum from and out of the net profits of the said l collieries and concerns respectively (but not from nts or income of my real estate) during the life of id son *James* under the age of twenty-one years, ecompence for the care, trouble, and industry of id son *William* in attending to the said concerns e benefit of my younger children; and I do also y will and direct, that when and so soon as my said *oseph* shall attain the age of twenty-one years, or arried, he shall be paid or allowed by my said es, for his own exclusive use and benefit, 10*l.* per m from and out of the net profits of the said l collieries and concerns respectively (but not from

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the rents or income of my real estates) during th my said son *James* under the age of twenty on as a recompence and satisfaction for the lik trouble, and industry of my said son *Joseph*, in at to the said concerns; but nevertheless, if my said t or the major part of them, shall be of opinion tha of my said sons so having attained the age of twe years, or being married, shall not have paid such attention to the said concerns as he ought to hav then it shall and may be lawful for the said tru withhold such allowance or share from such of so neglecting, for and during the year in whi son or sons shall be so negligent. The testa empowered the said *John Lees*, *John Lees Radley*, *Harrop*, and *Edward Brown*, and the survivo "until my said son *James* shall have attained of twenty-one years or die under that age; and consent of such of my sons as shall have from time attained their ages of twenty-one years, t leases for long terms of years, or conveyances all or any part of my said lands, tenements, or h ments for building upon, reserving, &c.;" and carry on so many coal works and concerns as tator should be a partner in at his decease. testator appointed the said *John Lees*, &c. ex and concluded his will with the usual clauses protection, indemnity, and reimbursement of of his said trustees and executors.

The said testator *Joseph Lees*, by a codicil date the 5th of *May* 1826, duly executed and for the passing of real estates, gave, devised, rected as follows: —

"Whereas, in and by my said will the ch my late son *William* will, amongst them, have entitled to an equal share with each of my oth and whereas, I have in and by an indenture

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on or about the 1st of *September* 1823, settled and
ed unto my said son *William*, his wife and children,
nuity of 100*l.*, to be paid for their joint lives, or
e life or lives of the survivor or longest liver of
; now I do hereby direct that the value of the said
ty of 100*l.* shall be deducted and abated out of the
and proportion of my freehold and personal estate
ffects, or one of them, which will go and belong to
ildren of my said son *William*, so that they may
ave a greater proportion than each of my other
And whereas, since the publication of my said
have purchased several estates or parts and shares
ehold estates, now I do hereby give and devise the
freehold estates or parts and shares of freehold
s, to the same persons for the same uses, upon the
trusts and for the same ends, intents, and purposes,
the same benefit of survivorship and limitations
and in the same shares and proportions, as are
ssed, limited, declared, and contained in and by
aid will concerning my freehold estates therein
and devised. And whereas, I have, in and by my
ill, empowered and directed my trustees therein
l, until my son *James* shall attain the age of twenty-
ears, to grant leases for long terms of years, or
ances in fee for building upon, reserved a yearly
d rent; now it is my will and mind, and I do
y give and grant unto my trustees the same power
ry respect, until my youngest child for the time
shall attain the age of twenty-one years."
this codicil and the appointment of *John Lees*
y and *Charles Harrop* as trustees and executors
evoked, and the testator's sons *Joseph* and *James*,
eirs, executors, administrators, and assigns, ap-
d trustees and executors in the room and stead
said *John Lees Radley* and *Charles Harrop*.
e testator died on the 10th of *May* 1826, without

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having revoked or altered his said will, except b
codicil above set forth, and without having revok
altered the said codicil; and the said will and c
were shortly afterwards duly proved in the prope
clesiastical court by the executors, *Edward B*
Joseph Lees, *James Lees*, and *John Lees*.

The testator, at the time of his death, was seis
fee-simple of one undivided moiety in certain
estates, consisting of lands, buildings, mills, mi
coal, chief rents, and other hereditaments in the pa
or townships of *Oldham*, *Royton*, and *Ashton-*
Lyne, and elsewhere, in the county of *Lancaster*
in the parish of *Saddleworth* in the county of
and he was also seised in fee-simple of certain pa
shares of and in the reversion of certain coal-mi
or near *Hathershaw*, *Broadway Lane*, *Copster*
Glodwick, *Horsedge*, *Holebottom*, *Swineclough*, *D*
and *Greenacres*, in the township of *Oldham* afo
and elsewhere, expectant on the determination of c
demises thereof, theretofore made, to certain c
companies in which the said testator was himse
gaged, and which demises were made subject to c
rents to him reserved in that behalf.

He was also at the time of his death, seised i
simple of certain other parts or shares of and in c
other real estates, consisting of lands, buildings,
mines, wharfs, chief rents, and other hereditame
Ashton-under-Lyne, *Chadderton*, and *Royton* afo
and in *Manchester* in the said county of *Lanc*
and also certain other real estates, or parts or
of real estates, in the said counties of *Lancaste*
York, and elsewhere in *England*. He was also pos
of certain parts or shares of and in certain collie
Ashton-under-Lyne, *Oldham*, *Chadderton*, and
aforesaid, which were held under leases thereof, g
by divers parties, for different terms of years t

also of other personal estate and effects to a consi-
ble amount.

he testator was married three times; and by his first
he had two children, *William Lees* and *Elizabeth*
ley, the plaintiff, now a widow, whose four children
uel, *Sophia*, *Mary Anne*, and *Sarah Radley*, are de-
ants in the second (*a*) suit. By his second wife he
besides one child who died an infant before the date
e will, two children, viz. *Joseph Lees* and the defend-
James Lees. And by his third wife, *Ann Lees*, now
dow, he had five children, viz. the defendants *Han-*
Lees, *John Lees*, *David Lees*, *Sarah Ann Lees*, and
er Lees. The children of the testator by his first
second marriages, respectively attained the age of
nty-one years in their father's lifetime. The children
his third marriage were all infants at the time of his
th. *William Lees*, the eldest son of the testator,
in his father's lifetime (as is stated in the codicil),
ing a widow, *Jane Lees*, one of the defendants, and
children, viz. *William Lees*, one of the defendants,
Elizabeth Lees, who is since dead, being an infant
intestate, and to whose estate the said defendant
Lees, has taken out letters of administration. *Joseph*
, the second son of the testator, and one of his ex-
ors, died on the 11th of *March* 1829, leaving a
w, the defendant, *Catherine Lees*, and one child,
liam Lees, another of the defendants; and the de-
ant *James Lees*, has lately had another son born,
ed *Joseph Lees*, who is also a defendant in this suit.
he questions for the opinion of this court are: —
irst — What estates or interests in the several lands,
ments, and hereditaments in the said will and co-
mentioned, passed to the several children and
dchildren of the said testator respectively, under and
irtue of the said will and codicil; and do such chil-

(*a*) *Ante*, 328. (*a*).

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dren and grandchildren respectively, or any of
take such estates and interests, or any of the
tenants in common or as joint-tenants, and to
shares and proportions are they respectively entitl

Secondly — At what respective periods do such
and interests respectively vest in such childre
grandchildren respectively; and do they vest abs
or subject to any, and what, limitations over?

Thirdly — What interests, in the residuary pr
of the testator, consisting of moneys arising fro
other devised property, and from the rents and pr
his real estates, and the accumulations thereof men
in the said will and codicil, passed to the several ch
and grandchildren of the said testator respectively
and by virtue of the said will and codicil; and is t
terest, so passing to them or any of them, that of
tenants or that of tenants in common, and in wha
portions?

Fourthly — What interest in the same residuar
perty passed to the defendant *Jane Lees*, the wid
William Lees, the eldest son of the said testator,
as such widow or as administratrix of the estat
effects of her deceased daughter *Elizabeth Lees*?

If the opinion of the court shall be, that the s
children of the testator who attained the age of t
one, did not take the said lands, tenements, and h
taments in the said will and codicil mentioned, as t
in common in fee absolutely, then the attent
the court is directed to the following will of
Lees the younger, the second son of the te
who attained the age of twenty-one in the lifet
his father, and died on the 11th of *March*
"First, I direct payment of all my just debts, f
expenses, and the charges of the probate of th
will; and I do hereby charge and make chargeal
and singular my real as well as personal estate wi

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ent thereof. I give and bequeath to my dear wife *rine* all my household goods and furniture, plate, and china, to and for her own use, absolutely. I give and bequeath, and devise to her my said wife, d during her natural life, if she shall so long con- my widow, but not otherwise, one annuity or clear y sum of 100*l.* to be paid and payable to her my wife without deduction, by two equal half-yearly ents in each year, that is to say, on &c. in each the first payment thereof to become due and be on such of the said days as shall next happen my decease; and I will and direct that such an- shall be issuing out of, and charged and charge- upon, all and every my lands, messuages, tene- s and hereditaments, and parts or shares of lands uages, tenements and hereditaments, whatsoever wheresoever situate; and I declare the provision by ny last will made for my said wife, shall be by her and had in full satisfaction of and for all dower or s at common law, which she might have or claim , or out of my real and personal estate and effects. minate, constitute, and appoint my said wife to be le executrix of this my will, and guardian of all very of my child and children so long as she shall ue my widow; and in case of her future marriage ath, I nominate, constitute, and appoint my bro- *James Lees* to be the executor of this my will and ian of my child or children. And as to for and rning all and singular the rest, residue, and re- der of my messuages, lands, mines, rents, tenements, hereditaments, and parts or shares of messuages, whether of the nature of freehold or leasehold, and soever the same or any of them may be situate in *nd*, together with all and singular the rest, re- and remainder of my personal estate and effects, at nature or kind soever the same may be, and not

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hereinbefore by me disposed of (subject neverth
the payment of my said debts and the said ann
give, devise, and bequeath the same and every p
parcel thereof unto all and every my child or
who shall be living at the time of my decease or d
born in due time afterwards, to hold to such child
one, &c., and equally amongst such children, if m
one, as tenants in common, and not as joint-
and to their heirs, executors, administrators, and
for ever, or for and during all my estate, term,
terest therein. And it is my will and mind
guardian of my said child or children shall and
out and expend such portion or part of the inco
ing from his, her, or their share or respective sh
and towards their maintenance, support, and ed
as the guardian shall think fit, until such
children shall attain the age of twenty-one years
I direct the surplus and accumulations of
estate (if any) to be invested for the benefit of su
or children, in government or freehold securit
not otherwise, with power to call in and rein
same from time to time, as circumstances may
And whereas, I am engaged in partnership
brother *James Lees* of *Clarksfield*, and do carry
siness with him, as merchant, manufacturer, and
spinner, in equal shares, under the firm of "*Jo
James Lees*," I direct my said executrix or e
for the time being, to carry on the same par
concern until the termination of the partnership
between us; and I do declare that she my said w
not be subject to any loss or defalcation that m
by carrying on the said business. And I d
that the money arising from my share of the st
partnership property, remaining due at the ter
of the partnership term, shall be invested in
ment or freehold securities during the minority

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or children. And I do authorise my said ex- ix to receive and apply the profits which may be ed from time to time towards the maintenance and ation of my said children."

he questions for the opinion of the court upon this are: —

rst — Is the annuity of 100*l.*, hereby given to the ndant *Catherine Lees*, chargeable upon the share e said *Joseph Lees* the younger, of and in the , tenements, and hereditaments, devised by the and codicil of the said *Joseph Lees* the elder, or e same chargeable upon the share of the said *h Lees* the younger, of and in the residuary pro- of the said *Joseph Lees* the elder, mentioned in third question above proposed, the said *Joseph* the younger not having, at the time of his death, other real or personal estate, after payment of his s?

econdly — If the said annuity is not so chargeable bove suggested, is the said defendant *Catherine* entitled to dower out of the share of the said *h Lees* the younger, of and in any of the mes- es, lands, and tenements, devised by the will and il of the said *Joseph Lees* the elder?

alfourd Serjt. (with whom was *Mellor*) for the tiff, and also for *James Lees*, *Edward Brown*, *nah Lees*, *John Lees* the younger, *David Lees*, *h Ann Lees*, *Esther Lees*, and *Joseph Jones*. With ect to the first question, it is submitted that, r this will, the testator's children, therein named, those that were born afterwards, took estates in n the freeholds, and the absolute interest in the holds, as tenants in common, in the proportions, tween the sons and daughters, pointed out by the With regard to the second question, it is con-

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tended, that such estates vested in the testator's chi
on his death, — *James Lees* his youngest son, b
second wife, having attained the age of twenty-o
his lifetime, — subject to an executory devise ov
their issue, in the event of their dying under tw
one leaving issue, and in the event of their
under that age without leaving issue, the sha
any one so dying to go among his or her bro
and sisters then living, as tenants in common, i
same proportions; and in case all should die
twenty-one without issue, then to the testator's ne
and nieces, with an ultimate remainder to his
heirs. It will be contended, on the part of the g
children, that there is an executory devise over to
on the death of their parents, without reference t
time of dying. There can be no doubt that,
the first part of the will, the children would
vested estates in fee, the words used being ap
that purpose. It is upon the limitations which fo
that the estates so given can alone be sought
cut down, namely, "and in case any of my chi
shall happen to die either before or after my sai
James shall attain the age of twenty-one years, &c
The clause immediately preceding the foregoing
ations, directing that "the annual income of
[sons and daughters] as shall be under age, t
applied in their maintenance," ought to be take
connection therewith, and as controlling their n
ing. The testator seems to have intended to pr
for three states of things; first, the death of a
his children under twenty-one and leaving i
secondly, the death of any of them under that
without leaving issue; and, thirdly, for the event
dying under twenty-one without such issue. No

(*a*) See *antè*, p. 337

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is made for the case of a child who shall die twenty-one without leaving issue, the only object the testator had in view being to provide for ent of the death of the children during their ty. This object may be effected, either by in-, in the first limitation, the words "under the twenty-one," which are contained in the other ions, or by introducing the word "such," or ing that word, where it occurs in the sentence iately preceding, to over-ride the whole of the ions. That words may be supplied in a will to ate a testator's intention appears from a variety horities. The earliest case is *Spalding* v. *Spald-*, where a man having three sons, *John*, *Thomas*, *William*, devised lands to *John* his eldest son, and eirs of his body, after the death of *Alice*, the r's wife, and if *John died, living Alice*, *William* be his heir; and the testator devised other lands *mas*, and the heirs of his body, and if he died *issue*, then that *John* should be his heir; and vised other lands to *William*, and the heirs of dy; and if all his sons should die without heirs r bodies, then, that his lands should be, to the n of his brother. *John* died in the lifetime of *leaving a son*. The court held, that upon the context of the will, the construction should be, *hn* died *without issue*, living *Alice*;" and that s the intent, appeared, it was said, by other parts will; the other sons having other lands, to them, *e heirs of their bodies*, and that if they all died *t issue*, it should be to his brother's children, eaning to disinherit any of his children. And declared not to be a contingent remainder or ion to abridge the former express limitation.

(*a*) *Cro. Car.* 185.

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So in *Sheppard* v. *Lessingham* (*a*), where *A.*, hav children, *F.* and *M.*, bequeathed certain stock, i as to one moiety, to the use of *F.* for life, re to such child or children of *F.* as should b at the time of her decease; and if she sho leave any child, or in case such children should d out issue, then, to *M.* for life, remainder to su or children of *M.*, as she should have at the her death; and in case the said *M.* should l issue of her body living at the time of her dea such child or children as she should so leave die without *leaving* any *issue*, then over; and a other moiety, the testatrix appointed the intere paid to *M.* for life, remainder to such child or as she should leave at her decease, and in should leave no such child or children, or all su or children as she should leave should die *witho* then to *F.* for life, remainder to his children his decease, and in case *F.* should leave no children, or they should die without issue, then *J. S.* Lord *Hardwicke* C. was of opinion, that t construction was to be put on the words "*withou* in the bequest over of the second moiety to *F.*, a words "without *leaving issue*" in the bequest other moiety, the only difference intended in the tion of the two moieties, evidently being, to p as to one moiety, and *M.* as to the other. In *Kir* v. *Kilpatrick* (*b*), the very words sought to be here were supplied. There, *K.* bequeathed to his sons, *J.* and *S.*, 3000*l.* out of his bank-sto 70,000 rupees due on bond, and bequeathed the of his personal estate to *J.* and *S.*, to be equally d but in the event of the death of either of the *he attained the age of twenty-one years and witho* his share to go to the survivor; but in the event

(*a*) *Ambler*, 122. (*b*) 13 *Ves.* 476

without issue, then over. Lord *Eldon* C., on the rity of *Sheppard* v. *Lessingham*, supplied the words er twenty-one" in the latter bequest. So, in *Doe Leach* v. *Micklem* (*a*), the court supplied the words after her death" in order to make the devise to estator's sister intelligible. In *Doe dem. Cotton* v. *ke* (*b*), under a devise to one (who had two chil- born before, and one born after, the making of the and her heirs *during their lives*, it was held that tter words were repugnant, and that she took an of inheritance. And in *Smith* v. *Pybus* (*c*), where nuity was bequeathed, to be equally divided between B., *C.*, *S.*, and *S. D.*, "to them and their heirs, or rvivor of them, *in the order they are now mentioned.*" *V. Grant*, Master of the Rolls, rejected the latter s as repugnant. Here, there is a remarkable cor- ndence of minute expressions throughout the three es; which leads to the supposition, that the words ler the age of twenty-one years" were accidentally ed in the first clause, on which the question arises. submitted, therefore, that all the children living at estator's death took absolute vested estates in their ctive shares, and that the children of *William*, the or's eldest son, took nothing under the will, but that would take their father's share under the codicil.

ith respect to the third question, the answer is, that ildren of the testator living at his death took six ths of the residuary property as tenants in common, e proportions mentioned in the will; and that the ren of *William Lees*, the eldest son of the testator, the remaining one seventh as joint-tenants.

phen Serjt., for *Samuel Radley*, *Sophia Radley*, *Mary Radley*, and *Sarah Radley*, children of *Elizabeth*

(*a*) 6 *East*, 486.
(*b*) 12 *East*, 515.
(*c*) 9 *Ves.* 566.

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Radley, daughter of the testator by his first ma
With regard to the first question, it is contend
the testator's children under his will took a vested
in fee in the freeholds, and an absolute interest
leaseholds, as tenants in common, in the proportion
tioned in the will, subject to an executory devise,—
their respective deaths, and without reference t
deaths taking place before or after they should
the age of twenty-one,—to their issue, as joint-ten
fee, with a further executory devise over, of the
of any children dying under age and without is
the surviving children, or the issue of such as wer
as tenants in common. And, with respect to the
question, that the estates of the children vested
death of the testator, his son *James Lees* having a
twenty-one in his lifetime, and those of the grandch
on the deaths of their respective parents. Th
question arises upon the effect of the first executo
vise, whether it is to be taken as it stands, or it i
altered, as suggested, by inserting the words sough
supplied. It is submitted that it is to be expoun
it stands. The general rule undoubtedly is, that a
to be construed according to the words used; a
though it is competent to the court to transpose,
or supply words, it will only do so to effectuate
tator's intention, where there clearly appears to b
defect or repugnancy in the terms of the demise.
there is nothing ambiguous or absurd in the firs
ation over, namely, to the children in fee, but if th
leaving issue, then to such grand-children in fee.
limitation over is not an unreasonable one; and al
it has the effect of preventing the children fro
posing of their interests, it cannot be said that su
not the intention of the testator. If the limitatio
had all referred to the same event there might hav
some pretence for the assertion, that the words

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e introduced into the first limitation, had been ac-
ntally omitted: but they do not. The second limit-
n over is directed to a different event from the first,
ely, to the death of any of the children under twenty-
leaving no issue. So, the third limitation pro-
s for the death of *all* the children under that age
out issue; in which case the estates are to go to the
ator's nephews and nieces. There is no objection to
xecutory devise to issue, such issue taking as pur-
ers; *Pells* v. *Brown* (*a*), *Loddington* v. *Kime* (*b*), *Doe*
Cooper v. *Collins* (*c*), *Barker* v. *Barker*. (*d*) That
testator intended to settle his estate on his grand-
dren is manifest, on comparing the limitations as to
freehold and leaseholds with the bequest of the other
of his personal estate. *Spalding* v. *Spalding*, *Shep-*
d v. *Lessingham*, *Kirkpatrick* v. *Kilpatrick*, and the
er cases, which have been cited, are not applicable; for
ground on which the courts felt themselves justified
nterfering in all those cases, was, that the devises
ld not be taken as they stood. The codicil clearly
ws the view which the testator took of the limitations
he will; for he there states that under such will, the
dren of his late son *William* will, amongst them, be
tled to an equal share with his other sons. If, how-
, the construction contended for on the part of the
ntiff is to prevail, the children of *William* will take
ing under the will, as the devise to their father
ld lapse by his death after attaining twenty-one in
testator's lifetime; *Pow. Dev. by Jarman*, 3d ed.
. *n.* *Doe* v. *Brabant*. (*e*) The plaintiff is therefore
en to say, that the children of *William* will take their

(*a*) *Cro. Jac.* 590., 1 *Eq.* *Abr.* 187. *c.* 4.
(*b*) 1 *Salk.* 224., 3 *Salk.*, 1 *Eq. Ca. Abr.* 182. *c.* 23., *v.* 431., 1 *Ld. Raym.* 203.
(*c*) 4 *T. R.* 294.
(*d*) 2 *Sim.* 249.
(*e*) 4 *T. R.* 706., 3 *Bro. C. C.* 393.

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father's share under the codicil; but that is not so that the codicil contains is, not a devise, but a mere It has also been contended that the limitation in q is to be taken in connection with the previous with respect to the maintenance of the children their minority, or that the word "such" should troduced, so as to connect it with that clause. clear, however, that there is no necessary con between the clause with regard to maintenance a first limitation over; and even if the word "suc inserted, it would not answer the purpose for whi intended.

The answer to the third question is, that the c of the testator living at his death, and the issue o of them as were then dead, would take the res personal property, as tenants in common; the c taking in the proportions mentioned in the wi the issue of any deceased child taking their p share among them as joint-tenants; the share o child being subject to an executory bequest ove case of the death of such child under age and u ried, — to the other children, and to the issue o as were dead.

Atcherley Serjt., for *Jane Lees*, the widow of *W Lees*, the eldest son of the testator, as administra her daughter *Elizabeth*, submitted, first, that th children of *William Lees* took their father's sha tenants in common; and, secondly, that they t equal proportions, the preference given by the males extending only to the sons and nephews testator. He cited *Co. Lit.* 180. *b. et seq.*, *Oate Hatterley* v. *Jackson* (*a*), and *Jeffery* v. *Honywood*

(*a*) 2 *Str.* 1172., 7 *Mod.* 459. (*b*) 4 *Madd.* 398.

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e Serjt., for *William Lees*, the son and only sur- child of *William Lees*, the eldest son of the tes- contended that the children of *William Lees*, the r's eldest son, took under the will as joint tenants, ot as tenants in common. It is laid down in *Pow.* *ev.*, by *Jarman*, vol. ii. p. 368., "A devise to a ity of persons simply, it has long been settled, the devisees, joint-tenants." It is clear, also, that reference given by the testator to males over fe- is not limited to his sons and daughters and ws and nieces, but extends to grandchildren; for words "according to the proportions aforesaid," ld not to apply to the preceding part of the first tion over, they are without meaning.

nning Serjt., for *Sophia Lees*, daughter of *James* said he should follow the course of argument ed by *Stephen* Serjt. in favour of grandchildren, t that he should contend, with *Atcherley* Serjt., that randchildren took as tenants in common, and in proportions. He cited *Whatford* v. *Moore*. (*a*) as then stopped by the court, on the ground that terests of *Sophia Lees* were virtually represented part, by *Stephen* Serjt. and as to the remainder, by *ley* Serjt.

mpas Serjt., for *William Lees*, the son of *Joseph* the eldest son of the testator by his second wife, lso for *Joseph Lees*, the son of *James Lees*, the est son of the testator by his second wife, con- d, with *Stephen* Serjt., that the will contained an tory devise to the grand-children, without reference time of their parents' death, and that the grand- en took in the proportion of two to one in favour les. With respect to the questions under the

7 *Sim.* 574. *S. C.* on appeal, 3 *Mylne & Craig*, 270.

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will of *Joseph Lees* the younger, he insisted th
latter had no power to charge his share of his
freehold and leasehold estate with the annuity gi
his will to his widow *Catherine Lees*; and that,
annuity was chargeable on the residuary personal
she would, at all events, not be entitled to dower.

Channell Serjt., for *Catherine Lees*, the widow
seph Lees, the eldest son of the testator by his
wife, submitted that *Joseph Lees*, the son, took
the will an estate in fee in the freeholds as ten
common with the other devisees, subject to the
tory devise contended for by *Talfourd* Serjt.;
not, then that he took an estate tail; citing 2 *F*
Dev. by Jarman, p. 508, 509. 514., *Wood* v. *Bar*
Broadhurst v. *Morris* (*b*), and *Trash* v. *Wood* (*c*)
with respect to his share in the leaseholds, that h
absolutely, or subject to the like executory
With regard to the codicil, *Vaughan* v. *Fow*
shews that the view taken by the testator of th
of his will, cannot control the legal operation
terms of the devise.

As to the questions arising on the will of *Josep*
the younger, if he took a fee under his father's
the freeholds, subject only to an executory devis
in the event of his death under twenty-one, he
charge the annuity given to his wife, thereon; bu
took an estate-tail, it may be admitted that he cou
charge the freeholds, although he might char
leaseholds, in which his estate would be absolut
however, it should be thought that the annu
chargeable only on the personalty and accumu
mentioned in the third question, then the wid
Joseph Lees the younger is entitled to dower out

(*a*) 1 *East*, 259.
(*b*) 2 *B. & Ad.* 1.
(*c*) 4 *Mylne & Cr.*
(*d*) 1 *Keen*, 58.

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lds: *Buckworth* v. *Thirkel* (*a*), *Moody* v. *King* (*b*), *ith* v. *Nicholson*. (*c*)

fourd Serjt., in reply. The question is, whether a l intention is not manifested on the face of the o give the children vested estates, and complete l over the property, on their attaining twenty-one. clear that the testator looked to the period when n *James* attained that age, as the time at which his en should have their respective shares in their own al, and that all the provisions of the will are con- to the management of the property during their ity. If the construction contended for by *Ste-* Serjt. is to prevail, the powers of leasing, &c. given e will could not be exercised after *James* came of With respect to the codicil, the testator, undoubt- seems to have conceived that the children of his *William* would take their father's share; but such , even if amounting to a declaration of intention, t be received in explanation of the language used will.

e following certificate was afterwards sent to the r of the Rolls: —

his case has been argued before us by counsel, e have considered the two sets of questions men- therein; and, with reference to the first of those ons, we are of opinion,

s to the *freehold* lands that under the will and l of *Joseph Lees*, the testator, the children of the estator living at the time of his death, took an in fee in six seventh parts of the *freehold* lands, as s in common, in the proportion, as regards males

(*a*) 3 *B. & P.* 652 n., 10 *re*, 235. n.

(*b*) 2 *Bingh.* 447., 10 *B. Moore*, 233.

(*c*) 2 *Keen*, 719.

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and females appointed by the will in favour of
with an executory devise, in the event of the de
any of the said children, leaving issue, of the sh
each such child so dying, to the issue of such cl
joint-tenants in fee, in equal shares; and with a
cutory devise, in the event of the death of any
said children under the age of twenty-one withou
ing issue, of the share of each such child so dy
last aforesaid, to the surviving children of the te
as joint-tenants in fee, in the like proportion, as r
males and females, as is provided with respect
original shares.

"And further, that the children of the testator
William Lees, took an estate in fee, in one seventh
freehold lands, as joint-tenants, in equal shares.

"And as to the *leaseholds*, that the children
said testator living at the time of his death, to
whole interest in six sevenths of the *leaseholds*, as t
in common, in the proportion, as regards male
females, appointed by the will in favour of male
ject to an executory devise, in the event of the de
any of the said children leaving issue, of the sh
each such child so dying, to the issue of such ch
joint-tenants, in equal shares; and also subject to a
cutory devise, in the event of the death of any
said children under the age of twenty-one, and w
leaving lawful issue, of the share of each such ch
dying as last aforesaid, to the surviving children
testator, as joint-tenants, in the like proportion
gards males and females, as is provided with resp
the original shares of the testator's children.

"And further, that the children of the testator
William Lees, took the whole interest in one seve
the *leaseholds*, as joint-tenants, in equal shares.

"And with reference to the second question
first set, we are of opinion that the estates and in

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e testator's children living at his death, with the ption of such as take effect by way of executory e, and the estates and interests of the children of leceased son, *William Lees*, vested in them on the tor's death; and that the executory interests of the of such of the children of the testator as were g at the death of the testator, vest in such issue ctively, upon the death of their parent; and that xecutory interests, to arise to the surviving children e testator, on the death of any of the children of estator without leaving issue, vest in them, re- ively, on the death of such children without leav- ssue.

And with reference to the third question, we are of ion that the children of the testator living at the of his death, took six sevenths of the residuary onal property referred to in that question, absolutely, nants in common, in the proportion, as regards s and females, appointed by the will in favour of s; and that the children of *William Lees*, the son e testator, took one seventh of the same residuary onal property, absolutely, as joint-tenants, in equal ortions.

And with reference to the fourth question, we are inion, that *Jane Lees*, the widow of *William Lees*, no interest in the residuary property therein re- l to.

And with reference to the first of the second set of tions, we are of opinion, that the annuity given to defendant, *Catherine Lees*, by the will of *Joseph* her husband, is not chargeable upon the share of aid *Joseph Lees* the younger, of and in the lands, nents, and hereditaments devised by the will and il of the said *Joseph Lees* the elder, but that the is chargeable upon the share of the said *Joseph Lees*

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the younger, of and in the residuary property of th
Joseph Lees the elder, mentioned in the third of th
set of questions above proposed.

"The annuity being chargeable as above men
the remaining question does not arise.

"N. C. TINDA
"J. B. BOSANQ
"T. COLTMAN.
2d *July* 1841. "T. ERSKINE."

PEPPERCORN and Another *v.* PEACOC

A testator devised as follows: — "I give, devise, and bequeath unto *M. W. M.* the whole of my *property* situate in *P.*, with the furniture &c., and all other effects in and about the said premises, &c., and also 4000*l.* &c., and also my farm called *Southfield*, situa parish of *H* * * *. I leave to my nephew *W. H. W. all my other lands* s the parishes of *H.* and *M.*, *subject to the yearly payment of* 150*l. to m servant C. W.*, without any deductions whatsoever, commencing from my should it not be regularly paid the said *C. W.* may distrain. And shoul *M.* have lawful issue, *the said property* to be equally divided between h issue; and should she not have lawful issue, it is my desire that *South* should become the property of my nephew *W. H. W.*"

Held, first, that the words "*the said property*" did not comprise the *H.* and *M.*, devised to *W. H. W.* the nephew.

Secondly, that the nephew took an estate *in fee* in the lands in *H.* an

Thirdly, that *M. W. M.* did not, nor would her issue (if any), take a in the lands described by the testator as "all my other lands situat parishes of *H.* and *M.*"

A SUIT had been instituted by the plain enforce the specific performance of an agr entered into by the defendants, for the purchas of a reversionary interest in certain lands and h ments in the parishes of *Headington* and *Mar* the county of *Oxford*, contracted to be sold plaintiffs to the defendant. The matter came hearing before the Lord Chancellor, on the 5 *vember* 1840, upon a petition of appeal fr decision of the Vice-Chancellor, over-ruling

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ptions which had been taken by the defendants to naster's report, which found that the plaintiffs could e a good title to the lands agreed to be purchased, g the lands in question in the cause. Upon hearing said petition, his lordship directed that the opinion e judges of this court should be taken on the follow- ase:—

illiam Henry Whorwood, being seised in fee of al closes of land in *Headington* and *Marston*, in ounty of *Oxford*, including the lands comprised in greement for purchase, made his will, dated the 9th *ovember* 1834, in the following terms:—

I, *William Henry Whorwood*, of *Portswood*, in the ty of *Southampton*, a captain in His Majesty's navy, g in enjoyment of perfect health, and of sound mind, ory, and understanding, thanks to Almighty God he same, do make this my last will and testament anner and form following; that is to say, first, I devise, and bequeath unto my adopted child, *Mary rd Miles*, *the whole of my property*, situated in the ge of *Portswood* in the parish of *South Stoneham*, e county of *Hants*, with the furniture, horses arriages, and all other effects whatsoever, in and the said premises; and also 4000*l.* and upwards, becomes mine at the decease of Mrs. *Grace n*, my late brother's wife, which aforesaid 4000*l.* pwards is one half of a sum left by my late brother r, and at her decease to be equally divided between present brother *Thomas Henry Whorwood* and lf; and also my farm called *Southfield*, containing cres, situated in the parish of *Headington* in the y of *Oxford*. I also bequeath to my faithful nt, *Charlotte Webb*, all my plate, linen, and wines, ny wearing apparel and ready money. I leave to ephew, *William Henry Whorwood*, *all my other* situated in the parishes of *Headington* and *Mars-*

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ton, subject to the yearly payment of 150*l.*, to b quarterly, *to my faithful servant Charlotte Webb*, w any deductions whatsoever, commencing from t cease; should it not be regularly paid, the said *Ch Webb* may distrain; and should *Mary Whard Mile* lawful issue, *the said property* to be equally divid tween her lawful issue; and should she not have issue, it is my desire that *Southfield* farm, in the of *Headington*, in the county of *Oxford*, should b *the property* of my nephew *William Henry Wh* I also give to my faithful servant *George Wakefi* sum of 50*l.* a year of lawful money, without ductions whatsoever, during his natural life; a my funeral expenses to be paid by *Mary Whard* I also bequeath, at my decease, to my friends, *Alexander Barclay Branch*, Royal Navy, and Mr. *Savours*, of *Headington* in the county of *Oxfor* each, to be paid out of *the property of Mary Miles*. And I do hereby nominate, constitute, point *Alexander Barclay Branch*, Captain in H jesty's Navy, and *William Savours*, Esq., of *Hea* in the county of *Oxford*, joint executors of this and hereby declare this only to be my last testament. In witness, &c." Signed and publ the presence of, and attested by, three witnesses. in the prerogative court of *Canterbury*, on the *October* 1836.

The testator left a nephew of the name of *Henry Whorwood*, his heir at law, and who is stil *Mary Whard Miles*, in his will named, surviv and is unmarried; and his nephew, *William Whorwood*, in his will named, also survived him still living.

The lands agreed to be purchased, form part included in the devise of all the testator's "oth in *Headington* and *Marston;*" and the particular

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tracted to be sold, is the reversion in fee of those ds expectant upon the decease of the person in the named *Charlotte Webb*, who is still living.

By indentures of lease and release, bearing date respectively the 2d and 3d of *March* 1838, the release ng made between the said *William Henry Whorwood*, nephew, of the first part, and the said *Thomas Henry orwood*, of the second part, and the plaintiffs *William percorn* and *Mary Whorwood*, of the third part, — r reciting the said will, and the death of the testator ing the said *Thomas Henry Whorwood* his heir at law, that the said *Thomas Henry Whorwood*, the nephew, *William Henry Whorwood* were desirous of selling disposing of the inheritance in fee of the messuages, ds, and hereditaments thereinafter described and inded to be thereby released, and for better enabling m to effect such sale, they had agreed and deterred to convey and assure the said messuages, lands, other hereditaments unto the plaintiffs as therein pressed, — it was by the said indenture witnessed, that pursuance of the said recited desire, and for the ring of all contingent remainders, if any, in the said editaments expressed or intended to be thereby reed, and for the other considerations therein menned, they, the said *Thomas Henry Whorwood* and *lliam Henry Whorwood* the nephew, and each of m, did release and confirm unto the plaintiffs cer- closes, pieces, or parcels of meadow or pasture d or ground situate in the parish of *Headington*, the county of *Oxford*, therein more particularly cribed, and a certain piece or parcel of meadow or ture land, situate in the parish of *Marston*, in the nty of *Oxford*, therein more particularly described; d which parcels comprised the lands and hereditats in the agreement for sale to the defendant,) to d, unto and to use of the plaintiffs their heirs and

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assigns for ever, for certain purposes and upon c conditions therein contained, with a power, also th contained, that the plaintiffs or the survivor of the the heirs or assigns of such survivor, should, at time or times as they or he should think proper without any further consent or concurrence of th *Thomas Henry Whorwood* and *William Henry wood*, or their respective heirs, absolutely sell and pose of the said hereditaments and premises expr or intended to be thereby released, in manner th mentioned; and which power (if a good title cou made) enabled the plaintiffs to enter into the afor agreement for sale to the defendant.

The questions for the opinion of the court are

First,—whether the words "the said property" will of *William Henry Whorwood* the testator, in pleadings named, comprised the lands in *Headi* and *Marston*, devised to *William Henry Whorwood* nephew.

Secondly, — what estate the said *William Whorwood*, the nephew, took under the said test will, in the said lands in *Headington* and *Marston*.

Thirdly, — whether *Mary Whard Miles* in the tator's will named, did, or her issue, if any, will, any, and, if any, what, estate in the lands described i said will as "all my *other* lands situate in the par of *Headington* and *Marston*."

Channell Serjt. (with whom was *Tennant*) for plaintiffs. With respect to the first question, it is mitted that the words "the said property," do not to the lands devised to the testator's nephew, *Wi Henry Whorwood*, under the description of "all other lands situate in the parishes of *Headington Marston*." Those words clearly have relation onl the property in *Portswood* and to the *Southfield* f

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ed to *Mary Whard Miles* in the early part of the That this is so, appears from the testator pro- ng to devise the *Southfield* farm to his nephew, in vent of *Mary Whard Miles* not having lawful issue. the plaintiffs are right upon the first question, the d becomes immaterial. It is contended, however, *William Henry Whorwood*, the nephew, took only tate for life in the lands described by the testator, ll other my lands situated in the parishes of *Head-* and *Marston*." It will be argued on the part of efendant, that the nephew took the fee by reason of eing charged with the annuity bequeathed to *Char- Webb*. It is quite clear, that where an estate is de- without words of limitation, subject to a personal ge on the devisee, he takes the fee by implication; that it is otherwise where the charge is upon the e. The question here is, within which class of cases resent ranges itself. In *Doe d. Palmer* v. *Richard-*), which will be relied on by the other side, the e was as follows:—"All the rest, residue, and inder of my messuages, lands, tenements, hereditа- s, goods, chattels, and personal estate whatsoever, egacies and funeral expenses *being thereout paid*, e, devise, and bequeath unto my said sister *Jane hey*; and do hereby constitute and appoint her e and sole executrix, and residuary legatee, of this vill." Lord *Kenyon* held that the devisee took a on the ground that if the devise did not comprise hole of the devisor's estate, the interest as well as and, the legacies and funeral expenses might not be (*b*) The propriety of that decision was much ques- d by *Macdonald* C. B. in delivering the opinion of udges in the House of Lords in *Moor* v. *Denn d.* r. (*c*) There, a testator, after giving a life estate

3 *T. R.* 356.
Videantè, Vol. II. 17 (*d*).
(*c*) 2 *B. & P.* 247., 7 *Brown Parl. Cas.* (2d edit.) 607.

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in certain copyholds to *B.*, devised as follows;— the *rest* of my lands, tenements, and *hereditaments* freehold or copyhold whatsoever and wheresoev also all my goods, &c. *after payment of my just d funeral expenses*, I give, devise, and bequeath t unto my wife *S. C.*" It was held, that under vise *S. C.* took only an estate for life. In *Doe d.* v. *Snelling* (*a*), where a testator, after giving sev cuniary legacies, bequeathed to *G. S.* and *S.*, h certain messuages and lands in *B.* and *W.*, and his personalty, "after having thereout first paid charged all my debts and funeral expenses, also to the payment of the aforesaid legacies;" and nated *G. S.* his executor, whom he charged w payment of his debts, legacies, and funeral ex it was held, that *G. S.* and his wife took a fee in estate devised to them, by reason of the words " thereout first paid all my debts, &c." which cr personal charge on the devisees, in respect of t perty devised to them. Here, there is no p charge on the testator's nephew; for, the estate subjected to the payment of the annuity. *An Southouse* (*b*) will also be cited for the defendant. a devise of the testator's lands at *W.*, and all his in the estates of *J. C.* deceased, to *L. A.* for li after *L. A.*'s decease to *E. S.*, "charged and cha nevertheless to and with the payment of one an *J. T.*" for life, was held to give a remainder in *E. S.* Mr. *Jarman* in 2 *Powell on Devises*, 3d ed makes the following observations upon this d (and this argument chiefly depends upon the ness of those comments) "It is evident that the thought that the charge was upon the devise consequently their opinion involves no *denial*

(*a*) 5 *East*, 87. (*b*) 5 *T. R.* 29

ıe advanced in the present chapter. It seems, er, to be a misapplication of it. There is a total e of every expression importing that the annuity be paid by *E. S.* It was a simple devise to her, d with the annuity; and, as such, it is conceived l completely within the principle of *Doe d. Briscoe rk* (*a*), and the numerous other cases in which an ite devise charged with a sum of money or debts, en held to confer only an estate for life. The y might, in perfect consistency with the testator's sions, and clearly would, have attached to the into whosesoever hands it might devolve." *Bay*in *Roe d. Peter* v. *Daw* (*b*), referring to the case "In *Andrew* v. *Southouse*, it was clear that the nt was charged upon the person of the devisee." e d. *Peter* v. *Daw* a devise of "all my lands in *A. B.*, during her natural life, and after her death *B.*, his heirs and assigns, and for want of heirs en by *T. B.*, to *M. B.* and *E. B.*, *except 20l. to d out of E.'s part of the lands to M. B.*," was held e *M.* and *E. B.* only an estate for life. Lord *Elough* there says, "It appears, I think, from *Denn or*, as well as from the *principle* on which *Doe* v. *rds* was decided, that in this case a fee does not because this is not a charge upon the estate in the of the devisee." In *Doe d. Clark* v. *Clark* (*c*), observed by Lord *Lyndhurst* C. B. with respect words "being thereout paid," in *Doe d. Palmer chards*, that those words were "considered to t being thereout paid by the devisee, for the rty had been previously devised." Whether the case was or was not properly decided with reference principle which it laid down, it is submitted that resent case is distinguishable; for the words "be-

(*a*) 2 *N. R.* 343. 3 *M. & Sel.* 818.

(*c*) 3 *Tyrwh.* 120., 1 *C. & M.* 39.

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ing thereout paid" do not occur in the present
Neither does it contain any equivalent expression
the words "subject to the yearly payment of
by no means import that the annuity is to b
by the devisee, but are the very terms which
be selected to charge such annuity upon the
into whosesoever hands it might pass. Supposin
the nephew had died in the testator's lifetime
clear that the estate would have descended to th
charged with the annuity. [*Maule* J. Is there a
stance of an action having been brought against a
to recover an annuity under such circumstances?
such case is to be found in *Powell on Devises*, wh
the authorities are collected.

With respect to the third question, the answe
obviously depends upon that given to the first.
the words "the said property" do not refer to
described as "all my other lands situated in the p
of *Headington* and *Marston*," it necessarily follow
Mary Whard Miles did not, and that any issue sh
have will not, take any estate in such lands.

Ludlow Serjt. for the defendant. The words
said property," comprise the testator's lands in *He*
ton and *Marston*, previously devised to his nephe
that be so, and the court should think that the de
those lands is to the nephew in fee, by reason
annuity payable to *Charlotte Webb* or otherwise
the devise to the issue of *Mary Whard Miles* ma
effect as an executory devise; in which case the pl
cannot make a title to the lands which they hav
tracted to sell to the defendant. The words "th
property," must refer either to the whole of th
perty before mentioned, or to the next antec
There is nothing in the case, except the repeti
the word "property," to shew that it was used

ed sense. In *Com. Dig. Parols*, (A. 14.) it is laid that "relative words, generally are referred to xt antecedent, where the intent, upon the whole loes not appear to the contrary; as if an obligation *April* 2 *El.*, to pay 21st *April* next; the word re- the month and not to the day; for the payment e 21st *April* 3 *El.*" So (A. 16.) it is said, "in- e words are tantamount to universal, and refer to particulars precedent; as if a man devise *A.* to his nd *B.* to his wife, and afterwards devise the *same* o his son, this refers to *all* the foregoing lands, t to those in *B.* only. *Semb.* 1 *Ventr.* 368." (*a*) general rule undoubtedly is, that unless a dif- construction is to be gathered from the rest of strument, the word "said" has reference to the ntecedent. In *Rex* v. *Richards* (*b*), where an in- ent alleged a dwelling-house to be "situate in the aforesaid," it was held that the parish last men- must be intended.

e testator's nephew took a fee under the devise to f the lands in *Headington* and *Marston*. Where- charge of debts or legacies is made on a devisee, on lands in his hands, such charge enlarges the , although without words of limitation, into a fee . *Andrew* v. *Southouse* very nearly approaches the t case. There, the estate was devised "charged hargeable nevertheless to and with the payment of nnuity, &c. of 20*l.* per annum to *J. T.*;" and the e was held to take a fee. There is no substantial nce between the words used in that case and those yed here, namely, "subject to the yearly pay- of 150*l.*, to be paid quarterly to my faithful ser-

Gamage's case. The in *Ventris* are "the nds."

see *Wright* v. *The King*, 1 *A. & E.* 434.; 3 *N. & M.* 898.; *ante* Vol. I. 710.

1 *Moo. & R.* 177. And

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vant *C. W.*" It is clear, upon the authorities, th nephew took a fee; and the point would neve been doubted but for the notes to the last edi *Powell on Devises.*

Channell Serjt. in reply. Without disputing t thority of the case in *Ventris*, the question, to wh tecedent the words "the said property" refer, is intention; and it is impossible to read this will w seeing that, by those words, the testator meant comprise the lands previously devised to *Mary Miles.*

The following certificate was afterwards sent: -

"This case has been argued before us by co we have considered it, and are of opinion,

"First, that the words 'the said property' will of *William Henry Whorwood*, the testator pleadings named, do not comprise the lands in *Ha ton* and *Marston*, devised to *William Henry Who* the nephew:

"Secondly, that *William Henry Whorwood* nephew, took, under the testator's will, an estate in the said lands in *Headington* and *Marston:*

"Thirdly, that *Mary Whard Miles*, in the te will named, did not, nor will her issue, if any, ta estate in the lands described in the said will, as ' other lands situate in the parishes of *Headingto Marston.*'

"N. C. TIN
"T. COLTMA
"T. ERSKIN
"W. H. MA

END OF TRINITY TERM.

TRINITY VACATION,

FIFTH YEAR OF THE REIGN OF VICTORIA.

MEMORANDA.

Vincent Thompson, of *Lincoln's Inn*, Esq., having
a writ, issued in this vacation agreeably to the
ns of the 6 *G.* 4. *c.* 95., and having, on the 6th
July 1841, taken the oaths usually administered
ns called to the degree and office of serjeant at
came, under that act, a serjeant at law sworn.
e rings with the following motto, "*Nec ultra*
a."

he same day, the following gentlemen were ap-
Her Majesty's counsel learned in the law;
Whateley, of the *Inner Temple*, Esq., *Richard*
of *Lincoln's Inn*, Esq., *Sutton Sharpe*, of *Lin-*
n, Esq., *Charles James Knowles*, of the *Middle*
Esq., *Matthew Talbot Baines*, of the *Inner*
Esq., and the Hon. *James Stuart Wortley*, of
r Temple.

e same day, *Charles Austin*, of the *Middle Temple*,
ceived a patent of precedence, to have rank,
nd audience, next after *Matthew Talbot Baines*,

CASES

1841.

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLE

IN

Michaelmas Term,

IN THE

FIFTH YEAR OF THE REIGN OF VICTOR

The judges who usually sat in banc dur term were,

TINDAL C. J.	ERSKINE J.
COLTMAN J.	MAULE J.

Nov. 10. GRAHAM and Others *v.* FRETWELL and A

The traveller of the vendors signed, at the request of the vendees, the following

ASSUMPSIT, for goods sold and delivered. fendants pleaded; first, non assumpsit; s that there was no note or memorandum in writin the statute of frauds, and no acceptance of the

entry of a contract for the sale of goods in a book of the latter, "Of Co. *London*, 150 mats *Ma.* sugar at 71*s.* 6*d.* as sample. Per sea, wharf, first and second ships." For four years preceding, a variety entries had been signed by the traveller, and goods had been supplied thereto, which had been accepted and paid for.

Held, that the entry was not a sufficient note or memorandum of the under the seventeenth section of the statute of frauds, to bind the vend

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plea, the plaintiffs replied that there was memorandum.

was tried before *Tindal* C. J., at the *Lon-* after *Michaelmas* term, 1838, when a ver- d for the plaintiffs, subject to the opinion n the following case.

tiffs are wholesale grocers, residing in carrying on business under the firm of *pson, Graham*, and Co." On the 19th of , the plaintiffs' traveller, *Joseph Dyson*, e defendants, who are grocers residing at , and produced to them a sample of *Mau-* f the plaintiffs; and, on the account of the l to the defendants one hundred and fifty *itius* sugar, to be sent to *Fenning's Wharf*, wharf on the *Thames* where vessels trading *rough* to *London* loaded and unloaded, and ded from *Fenning's Wharf* by the first and to *Gainsborough*. At the time of the sale, *John Fretwell*, in the presence of *Dyson*, y of the contract of sale in a book of the hen produced for that purpose; and *Dyson* , and in the presence, of the defendant *John* ed the entry so made. The entry was in ng of the defendant *John Fretwell*, but the it was in the handwriting of *Dyson*. The follows: —

Simpson, Graham, & Co. *London*.
Mats *Ma*. Sugar at 71*s*. 6*d*., as sample.
" *Joseph Dyson*."

Fenning's Wharf,
econd ships."

l occasions prior to the 19th of *August* , as the traveller of the plaintiffs, sold by e defendants, sugars to be supplied to them

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by the plaintiffs, which sugars were, before the said of *August* 1836, supplied to and accepted by th fendants, and at the expiration of the credit and the 19th of *August* 1836, were paid for by the d ants. On the occasions of the last-mentioned notes in the form hereinafter stated were entered b defendants or one of them in their book, and sign *Dyson* at the request of the defendants.

" Of *North*, *Simpson*, *Graham*, and Co. *London.*

" 5 Tierces sugar, $\frac{\text{FFL}}{\text{E}}$ 1 to 5 at 64*s.* per cw

" 2 Hhds. pieces - - 67*s.*

" 1 do. *Hambro* loaves - 80*s.*

" 1 do. *Titlers* - - 79*s.*

" *Gainsborough*, 22nd of *August*, 18

" *Joseph D*

" To *Hay's Wharf*,
Irongate."

[The case then set out twelve other entries of s a similar character, extending through the years 1834, and 1835, and continuing down to the mo *July* 1836.]

On the 23d of *August* 1836, the plaintiffs sent mats of sugar, the same as the sample produced b *son* at the time of the sale to the defendants to *Fe Wharf*, and on the same day an invoice was sent defendants stating that the sixty mats would go *Fanny*, Captain *Pycock*, which was the first ship to *Gainsborough*, and was then expected to sail in days, and the rest by the next ship.

On the 29th of *August* 1836, the remaining mats were sent by the plaintiffs to *Fenning's Wharf* forwarded to *Gainsborough* by the second ship would sail, the *Fanny* not having yet sailed. Of last ninety mats, sixty were of the same descripti

e sample produced by *Dyson* to the defend- aining thirty mats were of the same descrip- to say, *Mauritius* sugar, but of a superior were furnished by the plaintiffs at the same others.

ening of the 29th of *August* 1836, all the price of which amounted to 666*l.* 7*s.* 6*d.*, g at *Fenning's Wharf* to be forwarded by ers to the defendants, were consumed by

was admitted at the trial on the part of the prove (and which, if admissible did prove) g to the custom of the trade, the words were satisfied by delivering sugars of the tion as, but superior in quality to, the is evidence was objected to on the part of ts.

tions for the opinion of the court are: ther there was a sufficient note or memo- in the seventeenth section of the statute of condly, — whether the evidence as to the properly admitted. If the court shall be of the plaintiffs on both the above questions, s to stand. If the court shall be of opi- r of the defendants upon the first question, to be entered. If the court shall be of vour of the plaintiffs upon the first question, of opinion that the evidence as to custom perly admitted, such evidence is to be con- truck out of the case, and the question, plaintiffs were then entitled to recover for art of the goods in question, is to be for of the court. If the plaintiffs are held ecover for any of the sugars in question, the be entered for the value of as many mats

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of sugar as the court shall direct, estimated at 7 per cwt. (*a*)

The court to be at liberty to draw any in which a jury might have drawn; and either party at liberty to turn the case into a special verdict.

Channell Serjt. for the plaintiffs. The plainti entitled to recover the value of the 150 mats of contracted to be sold by them to the defendants. the trial, the case of *Graham* v. *Musson* (*b*) ha decided in this court; but that case is distingui in several respects from the present. There, points were taken in the argument on behalf plaintiffs. First, that *Dyson*, the plaintiffs' tra was, for the purpose of that contract, to be cons as the agent of the defendant; secondly, that not essential for the name of the defendant to in the contract; and, thirdly, that parol evide *Dyson*'s agency was admissible. The case was, ever, decided on the ground that there was no ev to shew that *Dyson* was the agent of the defe There, the entry was altogether in *Dyson*'s wr here, the signature alone is his, the rest of the being by one of the defendants. Also, in tha but one transaction was proved between the p whereas here, twelve other transactions, commenc 1833, and extending down to the period of the p contract, are set forth in the special case. It furth pears that on every one of the occasions when th chases were made, the defendants produced their which was signed by *Dyson* at their request, an the goods were afterwards duly delivered and acc As the court have a power given them here, whic

(*a*) It appears to be assumed that the mats were all of equal *weight*.

(*b*) 5 *New Cases, Scott*, 769.

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ss in the former case, — namely, to draw which a jury might have drawn (*a*), — they infer from the various transactions set on was authorised by the defendants to sign on their part, — a conclusion which they l at liberty to come to in *Graham* v. *Mus*- solitary instance upon which the question [*Tindal* C. J. The signing of the entry dants' book would tend to make it obli- plaintiffs rather than on the former.] An frequently to be inferred from a long ling; and here, it is submitted that enough the case to warrant the court in drawing n that *Dyson* signed this entry as the agent ants.

lock, for the defendants, was stopped by

J. This case is not to be distinguished v. *Musson*.

ERSKINE, and MAULE JJ. (*b*) concurred.

Judgment of nonsuit; with liberty to the plaintiffs to turn the special case into a special verdict. (*c*)

ex v. *Rawden*,

ner case was de- C. J., *Vaughan*, *Erskine* JJ. liberty was re- r party to turn e into a special ve of the court o make the re- ble. *Vide Moir*

v. *Royal Exchange Assurance*, 6 *Taunt.* 246., 1 *Marsh.* 577., 1 *N. & M.* 181. 741. On the other hand, where no such liberty is expressly reserved, the court, if it sees fit, may, upon the application of either party, though opposed by the other party, give permission to turn the special case into a special verdict. This was done in the

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case of *Collins, Burnell, and Merceron* v. *Gwynne*, 7 *Bingh.* 423., 5 *M. & P.* 276., 9 *Bingh.* 544., 2 *Moore & Sc.* 640., 4 *Dowl. P. C.* 122., 2 *Scott*, 332.

In that case, judgment being given for the plaintiffs in this court upon a special case stated *by consent*, in which consent there was not any reservation of a power to turn the special case into a special verdict, this court, notwithstanding a strenuous opposition on the part of *Taddy* Serjt. for the plaintiffs, granted leave for that purpose; and a special verdict was accordingly entered on the postea, *mutatis mutandis*, in the terms of the special case. A writ of error being afterwards brought in the Exchequer Chamber, upon the judgment of this court, in favour of the plaintiffs below, on the special verdict tered, such judgment firmed by the court *Gwynne* v. *Burnell a ceron*, 2 *New Cases*, the judgment of affirm reversed in the House 6 *New Cases*, 453., 1 *R.* 711., 1 *West's R Dom. Proc.* 342. And *lins* and others v. *antè*, Vol. I. 638., 2 *S.* 775., 2 *Scott, N. R*

The circumstance, application to turn th case into a special ver *resisted* by *Taddy* Serj half of *Burnell and M* the surviving plaintif stead of being, as it supposed, *assented to* — is now stated *ex* Sir *Thomas Wilde* S counsel with the defen *Gwynne*, in such appli

TER and Another *v.* PURNELL. *Nov.* 10.

turn to a writ of false judgment directed eriff of *Somersetshire*, commanding him to recorded (*a*) a plaint in his county court, bove parties, the proceedings appeared to

—

d *June* 12th, 1839.

continuance to the next county court, *Au-*

. Attachment by the plaintiffs prayed. ntered by defendant; attorneys appointed nd defendant. No continuance.

th. Declaration. — "*Somersetshire*, to wit, *r* and *Robert Dempster*, the plaintiffs in *B. H.*, their attorney, complain of *Cyrus*

A declaration in a county court, after stating that the defendant was summoned to answer the plaintiffs in an action of debt, without mentioning a sum demanded, proceeded to state that the defendant, on &c., at &c., within the jurisdiction of

debted to the plaintiffs in 1*l.* 19*s.* 6*d.* for goods then and there d, *and* in 1*l.* 19*s.* 6*d.* for money found due on an account then " which said *several sums* were to be respectively paid by the plaintiffs on request; whereby, and by reason of the non-pay- action hath accrued to the plaintiffs, to demand and have of and ant the said *several sums* respectively amounting to the sum of t the defendant hath not paid *the said sum above demanded*, or : to the damage of the plaintiffs of 1*l.* 19*s.* 6*d.*"

demand exceeding 40*s.* appeared on the face of the declaration, , that the county court had no jurisdiction; and that the bill which was returned as part of the proceedings,) could not be re- r to shew that, in reality, the demand was below 40*s.*

n the nature of a demurrer to the jurisdiction, the county court for the defendant, *awarding him costs*. This court reversed that ave judgment that the defendant go thereof without day in the said same judgment which the court below ought to have pronounced. f false judgment, where the whole of the error books had been party, the court (by analogy to the rule, with respect to writs l to allow the opposite party to be heard until he paid for those ht to have been furnished by him.

was retnrned which is returned upon a *cer-*
rt of the new *tiorari* is taken as part of the
cord, as that old contemporaneous record.

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Purnell, the defendant in this suit, who has been moned to answer the said *James Dempster* and *Dempster*, in an action of debt. For that whereas t fendant, on the 11th of *June* 1839, at *Wells* in the aforesaid, within the jurisdiction of this court, debted to the plaintiffs in the sum of 1*l.* 19*s.* 6*d.* price and value of goods then and there sold a livered by the plaintiffs to the defendant at his re *and* in the sum of 1*l.* 19*s.* 6*d.* for money found due from the defendant to the plaintiffs on an a then and there stated between them; which said *sums* were to be respectively paid by the defend the plaintiffs on request; whereby and by reason non-payment thereof, an action hath accrued plaintiffs to demand and have of and from the def *the said several sums respectively, amounting to the* 1*l.* 19*s.* 6*d.*; yet the defendant hath not paid th *sum* above demanded, or any part thereof, to the d of the plaintiffs of 1*l.* 19*s.* 6*d.*, and therefore they suit, &c. Rule to plead.

Same court — particulars of demand were fi follows: — "This action is brought to recover th of 1*l.* 18*s.* 8*d.*, being the balance due to the pl upon the following items of account. [The items were then set out, amounting in the wh 3*l.* 11*s.* 6*d.*, and credit was given for payments count to the amount of 1*l.* 12*s.* 10*d.*, leaving a b of 1*l.* 18*s.* 8*d.*] Above are the particulars of the tiffs' demand, and the plaintiffs will avail themsel all or any of the counts in the declaration in t tion for the recovery of the said demand."

Same court. — "And the said *C. Purnell*, by *V.* his attorney, answers to the plaint and de tion of the said *J. Dempster* and *R. Dempster*, in words following, that is to say. The defenda *his own proper person*, comes and says that this

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have or take further cognizance of this
e he says that the said *debts* in the first
unts of the declaration respectively men-
ting together to the sum of 3*l.* 19*s*, are
hem is demanded by the plaintiffs of the
and on account of and in respect of a
and certain causes of action arising upon
of the same dealings and transactions,
to one continued account; and that,
plaintiffs have demanded the said sum of
different counts in the declaration, by
ame into two equal parts, so as to reduce
nded in each count below the sum of 40*s.*,
said sum of 3*l.* 19*s.* in the declaration
lue from the defendant to the plaintiffs, is
recovered in this action in respect of one
and; and this the defendant is ready to
ore he prays judgment, whether this court
e further cognizance of the said action."

. Leave to plaintiffs to reply at the next
October 2nd): same day given to the de-

. And the said *J. Dempster* and *R. Demp-*
. their attorney, reply to the said plea of
urnell, by him in manner and form above
e words following, that is to say — And
say, that the cause of action arising upon
of the dealings and transactions between
this suit hath been correctly set forth in
ration. And this the plaintiffs are ready to
and where this court shall order, direct, or
ue joined.

ult. Leave given to plaintiffs to file their
ext county court. *October* 30th.

th. Issue filed by plaintiffs. Like leave to

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November 27th. *Consilium* filed. Day give next county court.

December 21st. Notice of continuance filed b of the next county court happening on *Christm*

December 25th. Leave to continue to the ne court.

January 22d, 1840. At which next court, (t before, &c., come as well, &c., whereupon court here, on hearing the pleadings between parties respectively, gave judgment in favou said defendant *Cyrus Purnell* upon his ple manner and form aforesaid pleaded by him. T it was considered by the said court, that the sai *nell do recover* of the said *James Dempster* an *Dempster, his costs and charges* by him expende about his defending the said suit of the said *J.* and *R. Dempster*, which said costs amounted to of *5l.* 12*s.* 6*d.* Award of execution.

The following errors were assigned by th tiffs:—That no day is given by the said reco plaintiffs or to the defendant, to appear at the court, held on the 4th *September* 1839. That it by the said record or return, that the plea o fendant, wherein he prayed judgment, whether county court would take further cognizance of action, was pleaded by attorney, and not by fendant in person. That in the said plea of fendant, it is not averred that the said several the declaration mentioned, amounted togethe sum of 40*s.*; and that the said plea, and the therein contained, in manner and form as th above stated and set forth, are not sufficien to preclude the county court from taking furth nizance of the said action. That it does no by the said record or return, that any issue, fact or of law, was joined in the said coun

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laintiffs and the defendant. That it does the said record or return, that there was hereof the plaintiffs and the defendant selves upon the judgment of the suitors ounty court. That it appeared by the return, that the eleventh county court eriff was holden on *Christmas-day*. That en by the said record to the defend- at the twelfth county court (22d *Janu-* That it does not appear by the said rn, that it appeared to the said county e plea by the defendant pleaded in man- aforesaid, and the matters therein con- sufficient in law to preclude the said ing further cognizance of the said action; reby alleged that the said court, on hear- gs between the said parties respectively, in favour of the defendant upon his plea, nd form aforesaid pleaded by him. That the record or return aforesaid, that everal debts in the declaration mentioned smaller sum than 40s., to wit, the sum of d no more, yet the said county court t in favour of the said plea of the de- at it appears by the record or return whereas it was a matter in dispute be- parties, whether the sums demanded by n their said action did or did not amount 40s., and the determination of the said er was material and necessary to the judg- id court, yet the said court proceeded to gment with respect to the said matters nquiry into the said disputed facts. That appears to have been given, that the ld be in mercy, &c. Joinder in error.

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June 2.

Talfourd Serjt., upon the case being called on, to the plaintiffs being heard, on the ground paper books had been delivered by them, a on such books being furnished by the defend plaintiffs had refused to pay for them. The *H. T.* 4 *W.* 4. (*a*) by analogy clearly extends present case, and great inconvenience would any exception were allowed. *Best* v. *Prior* (*b* that before the framing of the rule the prac the same.

Stephen Serjt. *contrà*. The rule applies only of error from the superior courts, and is not ap to writs of false judgment. [*Tindal* C. J. T undoubtedly, does not, in terms, extend to writs judgment. But although a writ of false judg not, in strictness, a proceeding in error, it bears analogy to it, falling within the same princip *Fuller* v. *Osborne* (*c*), and *Fulham* v. *Bagshaw* refusal by the defendant to pay for two of th books delivered by the plaintiff, was held to ground for signing judgment against him. The question being an arbitrary and positive reg ought not to be extended by implication.

(*a*) Which provides that, "Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority; and, in default thereof by either party, the other party may, on the day follo liver such books as have been so delivere party making default party making default be heard until he sh paid for such copies, sited with the clerk of in the King's Bench, c condary in the Comm as the case may be, a sum to pay for such c

(*b*) 2 *Dowl. P. C.* 1

(*c*) 6 *T. R.* 477.

(*d*) 1 *B. & P.* 292

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J. Although the rule is, in words, con- of error, a writ of false judgment is a rror; the only difference being, that the judgment of a court of record, and the of a court not of record. Reason and em to require that the same practice as to both; I therefore think that the paid.

jt. objected, that it was now too late, as d notice of the objection when the case n in the preceding term.

J. The amount may be paid now.

having been handed over to one of the court,

. for the plaintiffs, was heard in support ent of errors. The declaration is sub- ; and, if so, the plea is bad, and the titled to judgment. Without at present e bill of particulars, the declaration, on contains nothing more than a claim, in urts, one for goods sold, and the other stated, of the same sum of 1*l.* 19*s.* 6*d.* stain the objection raised on the other ration, instead of averring, as it does, several sums" amount to 1*l.* 19*s.* 6*d.*, — shews that the demand was limited to ould have alleged that they amount to not competent for the defendant to say ms mentioned of 1*l.* 19*s.* 6*d.* are not the r he has pleaded over. At the most, is only ambiguous. The cases shew that ndant has pleaded over, the declaration rued in that way which will support it.

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[*Maule* J. Does that doctrine apply to courts o jurisdiction?] It is submitted that it does, fo founded in good sense, it is a rule of general tion. It is laid down in *Hobson* v. *Middleton* (where, in pleading, an equivocal expression is is in general to be construed against the par whom it is used; but if the other party plea then it is to be read in that sense which will the pleadings. There seems no reason why th ciple should not apply to courts of limited juri [*Maule* J. If it be doubtful on the declaration the county court has jurisdiction, no intendmen made in its favour.] A superior court ought n croach on one of inferior jurisdiction. 2 *Inst.* 31 *King* v. *The Sheriff of Herefordshire*, in a *Dealey* v. *Clark* (*b*). It is clear that if a deb duced by payment below 40*s.*, an action will l county court for the balance; *Com. Dig.* title (*c.* 8.); and here it appears by the particulars, plaintiff were seeking to recover only a bal 1*l.* 18*s.* 8*d.* It is submitted that the plaintiffs titled to consider the particulars as parcel of th ings, and as operating in aid of the declaration it requires explanation. Although the county not a court of record, from the time that the s called upon to record the proceedings by a writ judgment, the particulars form part of such proc Moreover, it was decided in *Rider* v. *Edwards* this court will not take judicial notice of the pr the county court; and how can this court kn the particulars which appear to be filed with th tiffs' declaration, do not form part thereof? In perior courts the particulars do not form a p the declaration, because they are not on the rec that distinction is not applicable to the prese

(*a*) 9 *B.* & *C.* 295., 9 *D.* & *R.* 249.

(*b*) 1 *B.* & *Ad.* 67

(*c*) *Antè*, 202.

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Supposing this had been a declaration in
urt, could you not have recovered both
breach is, that the defendant had not paid
demanded, which shews that the plaintiffs
both sums. [*Maule* J. It has been held
nistake in adding up is immaterial, and
d. You say that this latter part of the
n exposition of the plaintiffs' intention.]
uent proceedings are clearly erroneous.
e being joined the suit was discontinued;
good objection after judgment in the
Anon. case (*a*); *Smith* v. *Smith* (*b*); *Wal-*
(*c*); 1 *Wms. Saund.* 74. *n.* (1); 2 *Wms.*
note (*b*), 5th edit. Also there was no
inuance of the proceedings, — no *dies*
venth county court; — and this defect was
the parties subsequently appearing; for,
he authorities, unless the suit be properly
parties have no right to present them-
court; *Com. Dig.* tit. *Pleader*, (W. 6.);
. pl. 8.; *Clobery* v. *The Bishop of Exon* (*d*);
Launsdon (*e*); *Peplow* v. *Rowley.* (*g*) Sup-
claration to be good in substance and the
oceedings to be erroneous, the court must
gment as the court below ought to have
v. *Brook.* (*h*)

erjt. for the defendant. The declaration
It neither states that the cause of action
t the defendant resided, within the juris-
county court. (*i*) [*Tindal* C. J. It states
dant was indebted within the jurisdiction

3.
.
6.
2.

(*g*) *Cro. Jac.* 357.
(*h*) 2 *New Cases*, 324., 2 *Scott*, 511.
(*i*) *Vide antè*, 171.

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for goods *then and there* sold and delivered, an account *then and there* stated. It is not nece allege that the defendant resides within the juri If he does not, his non-residence would be grou prohibition.(*a*)] It is clear, on the authorities, tha distinctly appear on the face of the declaration, debt sought to be recovered, does not exce *Reder* v. *Bradley* (*b*), 2 *Mod.* 106. (*c*), *Com. Dig.* (C 8.) In debt, the sum demanded is that sought to be recovered; and if this had been a in a superior court, the plaintiffs would have b situation to recover both sums. In *Lord* v. *Hous* it was held, on demurrer to a declaration in debt to be no objection that the sums demanded several counts amounted to more than the sum manded in the queritur; for that such dem superfluous, and might be rejected. Here, no stated in the commencement of the declaratio sum demanded; which makes the case stronger the plaintiffs. It is apprehended that the questi is, not matter of speculation as to what the plai tended, but, whether, if the action had been br a superior court, they could not, on proving mands, each amounting to 1*l.* 18*s.* 6*d.*, have re both. For if that be so, then this was clearly a which the county court could not take cogniza is said recourse may be had to the particulars to support the declaration; but they can never fo of the record. Supposing the county court received evidence of a demand not within the lars, but which was covered by the declaration, that have been error? The defendant in his pl in effect, although the plaintiffs have shaped t mands in two different ways, they have still place

(*a*) But see 4 *N. & M.* 94 n.
(*b*) 2 *Mod.* 101.
(*c*) *Anonymous.*
(*d*) 11 *East*, 62.

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tuation to recover both of these sums; and
appear to have taken the same view in
ion, and to have raised matter of law; which
ided by the court.
iitted that a complete issue was joined be-
rties; and that the objection for the want
ce was cured by their subsequent appear-
cases cited upon the latter point are clearly
le from the present.

rjt. in reply. The principal question is,
y of the declaration. The cases cited from
Reports were both actions of assumpsit, in
aintiffs sought to recover damages exceed-
is is an action of debt, in which nothing is
ond the single sum of 1*l.* 19*s.* 6*d.* It is
e plaintiff could recover both sums; but,
with what is alleged, the second sum may
nt of an account stated upon the cause of
ed for in the first count. The bill of par-
g returned by the sheriff as part of the pro-
st be taken to be a portion of the record.

C. J. I take the rule to be well established,
s of *Moravia* v. *Sloper* (*a*) and *Titley* v.
hat where it appears upon the face of the
that the inferior court has jurisdiction, every
will be made in order to support them; but
not so appear, or if the point, whether or not
court has jurisdiction, be left in doubt, no
ment will be made. (*c*) The main question,
this case is, whether or not it does appear,
of the declaration, that the county court had
As the county court cannot hold pleas in
tions above the value of 40*s.*, except in

les, 30.
588.

(*c*) *Antè*, Vol. I. 25.

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replevin or by writ of *justicies*, we must see ther the plaintiffs have brought their action for exceeding that amount. I agree that if the particulars could be used in aid of the declara would be shewn that the sum sought to be rec was under 40*s.*; but I can see no principle upon the bill of particulars can be considered as part declaration in the court below. In the superior the object of a bill of particulars is to inform the ants of the nature of the plaintiff's claim, and the proof of the latter to the amount therein men but it forms no part of the record itself; and seems no reason why a different rule should ob an inferior court. Looking, therefore, at this ation alone, let us see if the plaintiffs have broug action for a sum exceeding 40*s.* It commence "*James Dempster* and *Robert Dempster*, the plai this suit, by *B. H.*, their attorney complain of *Purnell*, the defendant in this suit, who has bee moned to answer the said *James Dempster* and *Dempster* in an action of debt." The first obse that suggests itself is, that this is a deviation fr ordinary form of the commencement of a declar debt. It does not state the amount for which th is levied. If it had done so, all would have been for the plaintiffs could not have recovered an beyond that amount. The plaintiffs then pro count upon their plaint, rather in the form of a count for two sums than of two distinct counts. that whereas the defendant on &c., at &c., wit jurisdiction of this court, was indebted to the p in the sum of 1*l.* 19*s.* 6*d.* for the price and v goods then and there sold and delivered by th tiffs to the defendant, at his request, and in the 1*l.* 19*s.* 6*d.*, for money found to be due from fendant to the plaintiffs on an account then an stated between them." The declaration proc

d *several* sums were to be respectively paid
ıdant to the plaintiffs on request," evidently
ıt they are distinct sums; and it goes on
ıy, "whereby, and by reason of the non-
reof, an action hath accrued to the plaintiffs,
and have of and from the defendant *the*
sums respectively amounting to the sum of
We cannot, after what has preceded these
ny other construction upon them than that
sums claimed by the plaintiffs amounts to
The breach is, that "the defendant hath
e said *sum* above demanded, or any part
sum being mentioned in the plaint, and
claiming throughout two sums of 1*l.* 19*s.* 6*d.*
plaintiffs intended to claim only the balance
l. stated in the bill of particulars, they
ıcknowledged, on the face of the declaration,
f so much money as would reduce the debt
unt; see *Comyns's Dig. County*, (C 8.) It
pears to me that the plaintiffs have not
demand so as to bring it clearly within the
of the county court. The defendant has
ıe jurisdiction, and other proceedings have
in the county court, to which it is unne-
fer, although there certainly appear to be
s on the record.

tiffs not being entitled to recover, the ques-
ıat judgment we ought to give. If we do not
dgment of the court below, it is not enough
y to reverse it. Upon reversal, we must
ıdgment as that court ought to have given.
that, as the defendant has pleaded to the
our judgment ought to be founded on that
dgment of the court below is a mere nullity,
reversed. The right judgment for us to
, that the plaintiffs be barred from proceed-

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ing further, upon the ground that the county co no jurisdiction. The consequence of which wil this is virtually a judgment upon a plea of aba that the defendant will not be entitled to costs.

COLTMAN J. I am of the same opinion. We make use of the bill of particulars to explain the ation; neither is it treated by the plaintiffs thems forming part of the declaration. Looking at claration, it seems to claim to recover two s 1*l.* 19*s.* 6*d.* each, and the breach alleging the ment of "the said sum above demanded," app me to mean the aggregate of the two sums named. If that be so, the county court clearly jurisdiction; and the judgment which that cou to have pronounced is, that they would not take cognizance of the suit. The judgment which pronounce, will have the effect of placing the p the same situation as that in which they wou stood, had the right judgment been given by th below.

ERSKINE J. was at nisi prius.

MAULE J. I also am of opinion that it app the face of this declaration that the county cour jurisdiction, inasmuch as the sum demanded 40*s.* There is no doubt if the declaration c aided by the particulars of demand, the objectio be obviated. But we cannot incorporate the pa into the declaration. In proceedings according course of the common law, such a thing as a bil ticulars is not known; and although we may as this case, that the practice of the county cou file the bill of particulars, that will not consti part of the declaration. It is admitted, on all

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ıration must shew that the sum sought to does not exceed 40*s.* The question turns struction of the phrase, "whereby, and by e nonpayment thereof, an action hath ac- plaintiffs, to demand and have of and from t the said several sums respectively amount- m of 1*l.* 19*s.* 6*d.*" If the meaning of this aid several sums *each* amount to 1*l.* 19*s.* 6*d.*, laration claims more than 40*s.*, and that e the sense in which the words are to be In point of form the declaration appears only one count. It does not state that t is indebted to the plaintiffs in 1*l.* 19*s.* 6*d.* ld and delivered, and that he is also in- m in 1*l.* 19*s.* 6*d.* on an account stated, but at the defendant is indebted to them in for goods sold and delivered, *and* in r money found due on an account stated. tion "and" can have no other meaning the latter sum an addition to the sum first Instead of there being any thing in the art of the declaration repugnant to that all that is afterwards stated appears to me onsistent with what had been alleged before. fore that this is a declaration in which it is over the sum of 3*l.* 19*s.*, and, consequently, ty court had no jurisdiction. The defend- oes not seem to be so much a plea as an nurrer. With regard to the judgment it is at all, except as to a matter in which the had no jurisdiction, namely, to award costs the plaintiffs to the defendant.

rule drawn up was as follows: "It is lered that the judgment of the court below, the said writ of false judgment mentioned,

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be, and the same is hereby reversed, t
nizance of the plea not belonging to
court, and that the defendant go
without day in the said court."

Nov. 12.

MATHEWS *v.* BIDDULPH.

Trespass for assaulting the plaintiff, and causing him to be taken to a police station, and afterwards before a magistrate upon an unfounded charge of having unlawfully attempted to procure from the banking-house of the defendant cheque-book. The defendant pleaded that he and certain other per ried on the business of bankers, and that one *T.* kept an account wi that the plaintiff did unlawfully endeavour to obtain from the said a blank cheque-book, by falsely pretending that the said *T.* was hi and had sent him for it: that in pursuance of such unlawful ende plaintiff induced one *A.* to go into the banking-house and to ask fo cheque-book, and did falsely pretend to the said *A.* that the said *T* master, and did direct the said *A.* to tell the bankers that the cheque- wanted for the said *T.*; that *A.* accordingly did so, and stated that he ha sent by the plaintiff, and that the plaintiff was waiting outside for it, w the defendant accompanied *A.* to the place where the plaintiff was wai *A.* stated in the presence and hearing of the plaintiff, that he had bee by the plaintiff; wherefore the defendant having good and probable cau picion, and vehemently suspecting that the plaintiff had, by such fraudulent pretences as aforesaid, unlawfully endeavoured to obtain from bankers, a blank cheque-book for unlawful and unauthorized purpo mitted the trespasses complained of.

TRESPASS. The declaration stated, that fendant, on the 8th of *January* 1841, wi and arms assaulted the plaintiff, and then sei laid hold of the plaintiff, and with great fo violence pulled and dragged him about, and the and compelled the plaintiff to go, and caused hi forcibly conveyed in custody in and along diver streets and highways, to a certain police stati there imprisoned the plaintiff, and kept and

Held, that the plea was bad, inasmuch as it neither alleged that a f been committed, so as to make it a good justification at common law the plaintiff had been "found committing" any offence against the of the 7 & 8 *G.* 4. *c.* 29., so as to justify his apprehension without warr the sixty-third section of that statute.

there without any reasonable or probable
ver, for a long space of time, to wit, two
lowing, at the expiration whereof the de-
and compelled the plaintiff to go, and
be forcibly conveyed in custody, from and
police station into and along divers other
and highways, to a certain public police
re again imprisoned the plaintiff, and kept
im in prison there without any reasonable
use whatsoever, for another long space of
ree hours then following, contrary to law,
false and unreasonable assertion, colour,
at the plaintiff had committed an offence
law, to wit, that he had attempted to
e defendant a blank cheque book under
dulent pretences; whereby the plaintiff
red great anguish and pain of mind and
s for and during all the time aforesaid,
prevented from attending to his lawful
affairs by him to have been done and
t was also thereby then greatly exposed
his credit, reputation, and circumstances;
o obtain his liberation from the said im-
as necessarily subjected and put to divers
it, 5*l.*, and was also then forced and ob-
and procure, and did find and procure
e appearance of him the plaintiff at the
ions of the peace for the liberty of *West-*
holden at *Westminster*, on the 14th of
next, to answer a certain false and un-
e then made against him by the defend-
ns of which several premises, and upon
unt whatsoever, a certain society of per-
constituted and appointed, to whom the
integrity of the plaintiff in the premises
n, and of which society he the plain-

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tiff then was a treasurer for profit and remu
dismissed and discharged him the plaintiff fr
situation; whereby the plaintiff lost and was de
divers profits, benefits, and advantages of gre
and amount, to wit, 50*l.*, which he the plainti
and would have otherwise derived and acquire
from. And other wrongs &c.

Plea: that before and at the said time, whe
the declaration mentioned, the defendant exerc
carried on the trade and business of a banke
partnership with one *T. S. Cocks* &c., in a certa
ing house or office, situate &c. under the n
style and firm of "*Cocks, Biddulph, Biddulph,*
and one *Peter Thompson* of &c. kept a banking
with, and was a customer of, the said *Cocks*
that just before the said time, when &c., to wit
the plaintiff did unlawfully endeavour to obt
the said *Cocks* and Co., a certain blank cheque
and belonging to the said *Cocks* and Co., by
there falsely pretending that the said *Thomp*
the master of the plaintiff, and that he the plai
been sent by the said *Thompson* to the said C
Co., to ask for and receive from them the sa
cheque-book, for and in the name and on accou
said *Thompson*; that in pursuance of such unl
deavour he the plaintiff just before the said ti
&c., in the declaration mentioned, did go into
street called &c. near unto the said banking-
the said *Cocks* and Co., and did then and ther
and prevail upon one *Atkinson* to go into the sa
ing-house, and to ask the said *Cocks* and Co., c
their clerks in the said banking-house, for on
blank cheque-books of the said *Cocks* and Co.;
then and there falsely pretend to the said *Atkin*
the said *Thompson* was the master of the plaintiff;
then there order and direct the said *Atkinson*, t

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son were asked in the said banking-house, the said *Atkinson* wanted the said blank he the said *Atkinson* was to tell the said ., or their clerk, that he the said *Atkin-* for *Peter Thompson*; that just before the en &c., in the declaration mentioned, the did, by such order and direction of the oresaid, go into the said banking-house of and Co., and did then and there, by such rection as aforesaid, ask one of the said said *Cocks* and Co. for a blank cheque- e said *Atkinson*, on being then and there defendant for whom he wanted the said -book, did then and there, by such order as aforesaid, answer and say to the de- ie wanted the said blank cheque-book for *Thompson*, and that he had been sent to id blank cheque-book by the plaintiff, and as over the way waiting for the said blank whereas, in truth and in fact, the said s not the master of the plaintiff; and uth and in fact, the plaintiff had not been said *Thompson*, nor had the plaintiff any tsoever from the said *Thompson* to ask for ie said *Cocks* and Co. for a blank cheque- pon the defendant did, just before the said ., in the declaration mentioned, accompany *uson*, from and out of the said banking- e said street called &c., and there found vaiting for the said *Atkinson*; and the said then and there, in the presence and hearing ff, state to the defendant, that he the said been so sent by the plaintiff, to ask for the said blank cheque-book as aforesaid; ie said defendant, having good and probable icion, and vehemently suspecting, that the

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plaintiff had, by such false and fraudulent pr
aforesaid, unlawfully endeavour to obtained fro
Cocks and Co. a blank cheque-book of the
and Co. for unlawful and unauthorized purp
at the said time when &c., in the declaration n
assault, seize, and lay hold of the plaintiff, an
and there deliver him into the custody of
police officer then there being, to be dealt with
to law, and did then and there cause the plai
conveyed in custody in and along the said pub
and highways to the said police-station in th
tion mentioned, the same being a proper and c
place for that purpose; and because it was t
convenient time to take and convey the plaint
a justice to be dealt with according to law
fendant did cause the plaintiff to be kept and
in prison in the said station-house for the sai
time in the declaration mentioned, and at the
thereof did cause the plaintiff to be conveyed i
from the said police-station along the said oth
streets and highways to the said police-office
claration mentioned, and to be there again in
until the said justice could hear and determine
ing the said offence of the plaintiff, when the s
did order and determine that the plaintiff sh
and procure such bail as in the declaration is m
and then discharged the plaintiff; all of whi
lawful for the defendant to do for the causes
which are the said supposed trespasses and a
the declaration mentioned. Verification.

Demurrer; and joinder.

Talfourd Serjt. in support of the demurrer
plea is to be taken to be a plea at common law,
the defendant seeks to justify the imprisonme
plaintiff for an attempt to commit a misdemea
clearly no answer to the action. A distinct

ll the authorities between an arrest by a dual and by a constable. In order to jus- by a private person, without a warrant, a ave been committed; *Hawk. P. C.* book 8. No case can be found where an arrest for commit a misdemeanor, which attempt is or of itself, is justifiable except under the some act of parliament. [*Tindal* C. J. understanding undoubtedly is, that where r only has been committed, a warrant must If it were otherwise, a man might be ap- r a libel, or for an assault which had been ng before. In *Beckwith* v. *Philby* (*a*), Lord ys, "There is this distinction between a dual and a constable: in order to justify the using the imprisonment of a person, he y make out a reasonable ground of sus- must prove that a felony has actually been whereas a constable having reasonable spect that a felony has actually been com- horized to detain the party suspected until e made by the proper authorities." [*Chan-* nitted that the plea was not a good plea at .] That being conceded, then the only has any bearing on the case is the larceny act, the 7 & 8 *Geo.* 4. *c.* 29. By the ction of that statute, "any person found ny offence punishable, either upon indict- summary conviction, by virtue of this act, he offence of angling in the day time, may ly apprehended, without a warrant, by any or by the owner of the property on or o which the offence shall be committed, or t or any person authorized by him, and en before some neighbouring justice of the

(*a*) 6 *B. & C.* 635., 9 *D. & R.* 487.

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peace to be dealt with according to law." Th
clearly does not apply to the present case; and
the plea is not aptly framed so as to make it
The only other section which can be relied
fifty-third, which enacts, "That if any person
any false pretence, obtain from any other pe
chattel, money, or valuable security, *with inte*
or defraud any person of the same, every such
shall be guilty of a misdemeanor." It cannot,
be contended that this plea charges that a mis
under that section had been committed. A
alleges is, an abortive *attempt* to obtain a blan
book by means of certain false pretences, which,
it may amount to a misdemeanor at common l
no offence within the above section. But, ev
plea had charged an offence under that clause,
fective, in not alleging an intent to defraud, wh
cessary in order to support the charge on an i
for obtaining goods by false pretences. The fa
in the plea clearly shew that this is not a case eit
the fifty-third or the sixty-third section of th
In order to authorize an arrest under the lat
it is not sufficient that a party is doing someth
indicates an intention to commit a criminal ac
though he must be "found committing," he n
already done something which amounts to a
within the provisions of the statute. [*Tindal*
the words "found committing," the legislature
have intended, not to give any power to arres
offence was completed.]

Channell Serjt. was then called on by the
support the plea. If it be considered necess
plea, justifying an arrest under this statute, sh
all the facts which would be requisite to ma

(*a*) See *Regina* v. *Meredith*, 8 *C. & P.* 589

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r obtaining goods by false pretences under section, undoubtedly, the present plea ported. The question however is, whether ient to state that the plaintiff was in the mitting what amounts to an offence under [*Maule* J. Does the plea even do that? ges is, that *Atkinson* told the defendant, in presence, that the latter had sent him to ue-book in the name of *Peter Thompson*.]

J. Can there be any offence under the ion of the statute, unless goods, money, are actually obtained by some false pre- tent to cheat or defraud some person of he plea is clearly bad.

nd MAULE JJ. concurred.

Judgment for the plaintiff

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n. Duke of PORTLAND *v.* ROE. (*Overton.*)

Nov. 6.

Where a declaration in ejectment is personally served upon an attorney, who is the tenant in possession, it is not necessary to explain the object of the service.

D Serjt. moved for judgment against the ctor, upon an affidavit of service of the which contained no allegation that the proceedings had been explained at the vice; but stated that the tenant, on whom was personally served, was an attorney.

J. He cannot say that he did not under-

Rule for judgment granted absolutely. (*a*)

(*a*) *Doe dem. Whitdams's Ejectm.* 214.; *Doe dem. Quintin* v. *Roe*, *ib.* 215.; *Anon.* 2 *Chitt.*

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DOE dem. Duke of PORTLAND v. ROE.

Rep. 182.; *Anon. ib.* 184.; *Anon. ib.* 185.; *Right dem. Bayley* v. *Wray, ib.*; *Doe dem.* *Thompson* v. *Roe*, *Doe* v. *Roe*, 1 *Dowl.* *Doe dem. Jones* v. *J*

Nov. 4.

HEENAN *v.* EVANS and WHEELDO

In case against a sheriff for a false return of *nulla bona*, the declaration alleged that the defendant seized and took in execution divers goods of *A.*, the judgment debtor, of the value of the moneys indorsed on the writ, and then levied the same thereout. Plea, that the defendant did not seize or take in execution any goods of *A.*, or levy thereout the money so indorsed, *modo et formâ*. The affirmative of the issue is not proved ing that *A.*'s goods were taken in pursuance of a warrant granted by upon the plaintiff's writ, such goods been insufficient to satisfy a wr delivered to the sheriff before the plaintiff's writ.

CASE against the Sheriff of *Middlesex*, f return to a *fieri facias*. The declarati that on the 27th of *June* 1840, in the court of the Queen of the Bench at *Westminster*, th recovered against one *John Rawlings* 46*l.* 3 judged to the plaintiff for his damages by him as well &c., for his costs &c., whereof the *Rawlings* was convicted; that the judgment full force, and the damages remaining unpai satisfied, the plaintiff on the 29th of *June* the obtaining satisfaction thereof, sued and p out of the same court a certain writ called a *fi* directed to the sheriff of *Middlesex*, by which said sheriff was commanded to levy of the g chattels of the said *John Rawlings*, the dama said, together with interest for the same, at t 4 per cent. &c., and that he should have th with such interest as aforesaid, before &c., to the plaintiff for his damages and costs as and that he should do all such things as, by t passed in the second year of Her said Majes

(*a*) 1 & 2 *Vict. c.* 110.

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ed and required to do in this behalf. at the writ was duly indorsed to levy sides, &c., and delivered to the defendants *Middlesex;* by virtue of which writ the eing such sheriff, seized, and took in exe- goods and chattels of *Rawlings*, of great of the value of the moneys so indorsed nd directed to be levied as aforesaid, *and e same thereout;* yet the defendants, so riff &c.,—not regarding their duty as such contriving, and wrongfully and unjustly njure, prejudice, and aggrieve the plaintiff ; and to deprive him of the moneys so e writ &c., and of the means of obtaining d not the moneys so levied as aforesaid, or eof in the same court, according to the e said writ, and of the indorsement &c., as s could and might and ought to have rein wholly failed, and made default; nor dants, nor hath either of them, paid such y part thereof, to the plaintiff. And the er the said levy, and before the commence- it, to wit, on the 24th of *July* 1840, wrong- nd deceitfully returned to the same court writ, that *Rawlings* had not any goods their bailiwick, whereof they could cause e damages aforesaid, or any part thereof; writ, and the return thereof, remaining &c. by means of which premises the plaintiff is greatly injured, and deprived of the ining the moneys so indorsed on the said cted to be levied, as aforesaid, and which unpaid, and is likely to lose the same. nt, for not levying the amount indorsed n which, after stating the judgment and e delivery of the *fi. fa.* as in the first

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count, it was alleged that although, at the time delivery of the writ, and afterwards, and wh said writ remained in full force, and before th mencement of the suit, divers goods and cha *Rawlings* were within the bailiwick of the def as such sheriff as aforesaid, whereof they cou might, and ought to have levied the moneys so i on the last-mentioned writ &c., and although a able time elapsed before the commencement of t whereof the defendants, during all the time afores notice; yet the defendants, not regarding their such sheriff, but contriving &c., did not, nor at any time levy the money last aforesaid, or a thereof, but wholly neglected and refused so to therein failed, and made default, and afterwards, &c., wrongfully, falsely, and deceitfully return that *Rawlings* had not any goods or chattels bailiwick, whereof, &c. *prout patet per recordum.*

First plea; not guilty.

Second plea, to the first count, *actio. non*, becs defendants did not seize or take in execution an or chattels of *Rawlings*, or levy thereout the mo the first count in that behalf mentioned, or a thereof, *modo et formâ*, concluding to the country

Third plea, to the last count, *actio. non*, becau were not at any time during the period in the la mentioned, any goods or chattels of *Rawlings* the bailiwick of the defendants as such she could &c., they the defendants have levied t moneys as in the last count mentioned, or a thereof, *modo et formâ*, concluding to the countr

On all of these pleas the plaintiff joined issue.

At the trial before *Tindal* C. J., at the sit *Guildhall*, after last *Michaelmas* term, it appea under the writ of *fi. fa.* set out in the declarat admitted by the several pleas, the sheriff sei

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ls of *Rawlings*, and that after payment of e, &c., the balance, 20*l.* 17*s.* was paid to *mley* & Co. in part satisfaction of a writ of suit, lodged with the sheriff previously to by the present plaintiff. The learned l a verdict to be entered for the plaintiff ue, and for the defendants on the last two, o the plaintiff to move to enter a verdict ues, with 20*l.* 17*s.* damages.

wing term, *Bompas* Serjt. moved for a rule dict for the plaintiff for 20*l.* 17*s.*, pursuant served. The sheriff seized and sold under writ. No evidence was given of any war- upon any writ previously received at the . It was contended at the trial, that by nder the first writ, the property in the anged; but this is not so; *Smallcomb* v. *ot* v. *Peckham* (*b*), *Samuel* v. *Duke.* (*c*) In *ison* (*d*) the defence was pleaded specially, articular form of plea which the defendant at case was held to be insufficient. A rule en granted,

Jan. 12.

erjt. now shewed cause. The point sought y this motion, has been recently decided f Queen's Bench, in *Wintle* v. *Freeman* (*e*); vas pending when this rule was obtained, been determined, and is precisely in point. laintiff declared for a false return of *nulla* count for not levying. The plaintiff had *fa.*, upon the delivering of which to the

Raym. 251., 1 *th.* 419., 5 *Mod.* 731. n. *W.* 622.

(*d*) 11 *A. & E.* 529., 3 *P. & D.* 245.

(*e*) 11 *A. & E.* 589., 1 *Gale & Dav.* 93.

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sheriff, the latter seized the goods of the ex debtor. The sum levied was exhausted by a rent paid to the landlord, under the 8 *Anne c.* 14. expenses of the levy, and the amount due upon writ of *fi. fa.* previously delivered to the she was held, that the return was proper, and th sheriff might give the special matter in evidence a plea alleging that the original defendant had no whereof the sheriff could levy the damages. two writs of *fi. fa.* are delivered to the sheriff bound to apply the proceeds of the sales of the seized under those writs in satisfaction of the writ is first delivered to him. (*b*) *Hutchinson* v. *John* and all the cases were considered in *Wintle* v. *F* *Drewe* v. *Lainson* shews that the objection is p taken by a traverse of the allegation of a seizu levy under the writ, and that a special replication the existence of prior writs, would be improper.

Bompas Serjt., in support of the rule. It m admitted that the cases cited are to a certain favourable to the defendants. The plaintiff, ho is entitled, not only to a verdict upon the first iss upon the second and third issues, which have be tered for the defendants. It was not incumbent plaintiff to prove more than this, that the sheriff seized goods, the property of *Rawlings*, notwithst which the defendants returned *nulla bona*. [M The declaration contains impliedly an allegation t goods seized were applicable to the payment

(*a*) Sect. 1.

(*b*) In *Ashworth* v. *The Earl of Uxbridge*, 2 *Dowl., New Series*, 377., one attorney being employed by the plaintiffs in six actions, delivered writs of *fi. fa.* to the sheriff in each action in one bundle. T refused to grant a rule ing the sheriff whether t should be executed w and what priority.

(*c*) 1 *T. R.* 729.

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bt. That implied allegation is put in issue It is submitted that the defence should ecially pleaded. [*Maule* J. If the sheriff ce, must he not have pleaded as he has r in the form used in *Wintle* v. *Freeman?* In that case it was held that there should simple traverse.] Taking the judgment n with the argument, it would appear to . [*Maule* J. Suppose the goods seized to he property of a third person, or to have y *Rawlings* in trust, it would not have ry to plead the matter specially. Here, ized were not, at the time of the seizure aintiff's *fi. fa.*, the goods of *Rawlings* for of being seized under that *fi. fa.*] *Wintle* hews that in point of law, the sheriff did ods of *Rawlings* under the plaintiff's writ. *Duke* (*a*) in trover against the sheriff and creditor, it was held, that it was not com- sheriff, under the plea of not possessed, the goods had been seized by virtue of an d that such defence ought to have been ded.

erjt., on the same side. The language of that the sheriff did not seize or take in y goods of *Rawlings*, or levy thereout the he first count mentioned. The issue is a statement in the plea, that the defend- do either; and the evidence shewed that ts did not levy under the plaintiff's writ. on disproved must appear to have been a gation. Was the statement that the de- not seize, a material allegation? The the declaration negatived by the plea is a

(*a*) 3 *M. & W.* 622.

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compound allegation of a seizing, and a levyin
out. The court of Queen's Bench appears
felt a difficulty in choosing amongst three const
each of which, however, assumed that the w
ported something beyond, and additional to, the

TINDAL C. J. I think the verdict was prop
tered for the defendants. The allegation in
claration is, that the defendants, by virtue of t
which had been stated to have issued, seized, a
in execution, the goods of *John Rawlings* for the
of the moneys indorsed on the writ, and then le
same thereout. When a declaration charges a
of goods in execution, it must be understood a
ing a seizure of goods, which are liable to be
execution, and out of which the sum recover
be levied. The plea follows the words of the
tion, and denies that the defendants did seize
in execution any goods of *Rawlings*, or that t
levy thereout the moneys indorsed on the writ
is exactly the same thing as saying that the de
did not seize, and that they did not levy. The
went to trial upon these two facts. The case o
v. *Lainson* in the Queen's Bench has distinct
blished the rule, that where several writs of e
are in the hands of the sheriff at the time he
seizure, it is perfectly immaterial under which
levy is made. The material part of the all
therefore, is, not the first branch of it, namely,
defendant seized and took in execution diver
and chattels of *Rawlings*, but the second bran
he levied the value thereout. But looking at
branch of the allegation, the defendants would
right in their plea to follow the words of the
tion. After the decision in *Wintle* v. *Freeman*,
legation that the defendants seized and took in e

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nd chattels of *Rawlings*, must be taken to
ie defendants seized and took in execu-
ls and chattels of *Rawlings*, as were liable
n execution under the plaintiff's writ.
contended, that it could not be a true
that there were no goods, when in fact
ken under the plaintiff's writ, but which,
ds found, were insufficient to satisfy prior
ie substantial decision in *Wintle* v. *Free-*
was that *nulla bona* is a just and true
the fruits of the levy have been exhausted
ns, as by rent due to the landlord, or
under prior writs of execution. Looking,
er at the first, or at the second branch of
I think that the issue has been properly
defendants.

. I am of opinion that the verdict has
found for the defendants. I apprehend
ng of the words in the plea must be go-
construction put upon the same words
e declaration, which words must be under-
ging the sheriff with a breach of duty.
the course pursued with reference to this
reach of duty, the declaration must be
stating that the sheriff had seized goods of
e to be taken in execution in satisfaction
f's debt; otherwise the declaration would

I am of the same opinion. The mean-
claration is, that the sheriff, having seized
o satisfy the plaintiff's execution, has been
each of duty, either by not levying there-
indorsed on the writ, as charged in the
or having so levied, by making a false re-

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turn of *nulla bona*, as stated in the first coun
plaintiff might have declared that the sheriff
lected to seize goods of *Rawlings* liable to be
in which case the defendants might have plea
Rawlings had no goods liable to seizure. This
is the state of the pleading with respect to the
count; but, in the first count, upon which this
been discussed, the allegation is that the de
seized and levied thereout; and the plea denie
legation *modo et formâ*. The same interpretati
be put upon the language of the plea, as upon
language occurring in the declaration. If the s
in the declaration is to be taken as importing,
defendants seized the goods of *Rawlings*, an
thereout the sums indorsed, then the substantia
the allegation is, the levying of the money, — a
which allegation, according to *Drew* v. *Lainson*
issue not only the fact of the receipt of the mone
but the obligation to apply that money in satisf
the plaintiff's execution. That being so, the
part of the issue is properly found for the defen

MAULE J. I also think the verdict is properly
for the defendants. The declaration states tha
fendants, as sheriff, seized and took in executio
of *Rawlings*, of the value of the moneys indor
levied the same thereout. The allegation is, no
that the defendants seized certain goods, but t
seized the goods of *Rawlings*. The term "g
Rawlings," imports "goods standing in *some* re
Rawlings." The words must here be understoo
a sense as to denote goods applicable to the sat
of the plaintiff's execution. Ambiguous terms
explained with reference to the subject matte
occasion on which they are used. Here, the lia
the goods to seizure, execution, and levy under

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ect to which the allegation referred. By
ıs used in this declaration must be under-
ods of *Rawlings* as were subject to a *fi. fa.*
plaintiff. *Nulla bona* is, under such cir-
proper plea. It cannot be true, that
lings were seized *under the plaintiff's writ*,
ere no goods of *Rawlings* liable to such

Rule discharged.

STANFORD *v.* ROBINSON. *Nov.* 9.

Writs of execution upon decrees and orders of courts of equity under 1 & 2 *Vict. c.* 110. *s.* 18., must issue out of the court in which such decrees and orders are made, and cannot be awarded by a court of common law.

e made in a suit depending between these
the court of Chancery, the plaintiff was
y certain costs to the defendant. Upon
ithout any judgment or action here, the de-
ut a *ca. sa.* in this court, under which the
aken on the 27th of *September* 1840.

moved for a rule, calling upon the de-
ew cause why this writ should not be
why the plaintiff should not be discharged
, and why the defendant should not pay
e application. The writ under which the
een arrested appears to have been taken
mplete misapprehension of the provisions
ict. c. 110. By that statute (sect. 18.) it is
all decrees and orders of courts of equity,
f courts of common law, and all orders of
cellor or of the court of Review in matters
, and all orders of the Lord Chancellor in
acy, whereby any sum of money, or any
, or expenses shall be payable to any per-
e the effect of judgments in the superior

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courts of common law, and the persons to w
such moneys or costs, charges or expenses
payable, shall be deemed judgment-creditors w
meaning of this act; and all powers hereby giv
judges of the superior courts of common law,
spect to matters therein depending, and by t
Chancellor and court of Review in matters
ruptcy, and by the Lord Chancellor in m
lunacy; and all remedies hereby given to ju
creditors are, in like manner, given to persons
any moneys or costs, charges or expenses, are
orders or rules, respectively, directed to be p
seems to have been supposed in this case, th
left to the parties to select their own court w
issued execution under this section. But it
mitted that the true meaning of the section is
process by which the payment of money de
ordered by the court of Chancery to be paid,
process issued by the court of Chancery. If a
could exist upon the construction of the ei
section, all such doubt is removed by the t
section, which directs, "that such new or alte
shall be sued out of the courts of law, *equity*,
ruptcy, as may, by such courts, respectively, be
necessary or expedient for giving effect to the p
hereinbefore contained, and in such forms as th
of such courts respectively shall from time to ti
fit to order." A difficulty has, perhaps, arisen
circumstance of the courts of equity not havi
any order, under the twentieth section, as to
process of execution under the act. [*Tindal* C.
waited till we should have published our forms.]

A rule *nisi* having been granted, *Channell* S
the plaintiff, admitted that the process ought
issued out of the court of Chancery, and that it

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end that this writ could be supported; that in quashing the writ, *quia impro-* he court would impose the terms of the taking to bring no action for the arrest.

ontrà, contended that the plaintiff was e his rule absolute, without any condi- xed.

The issuing of this writ may be con- ct of the court by its officer, as much as arty. The rule must be made absolute rayed, but the plaintiff must undertake on.

Rule absolute accordingly. (*a*)

(*a*) orders of *& W.* 223., 9 *M. & W.* 351., within the 9 *Dowl. P. C.* 731., 1 *Dowl. Pike*, 8 *M. N. S.* 409.

LDRIDGE *v.* STANFORD. *Nov.* 12.

lgment obtained by the plaintiff in this etainer having been lodged against the st in custody on *Robinson*'s writ, as he last case, he was now brought up by *l satisfaciendum*, for the purpose of being ution.

In this court a prisoner brought up for the purpose of being charged in execution is so charged by the court, without motion, unless the prisoner pays the con-

ppeared for the defendant, for the pur- ng his being charged in execution in

No opposition, therefore, can be offered to the commitment n execution, on the ground of any alleged illegality in the arrest. st form the subject of a motion for a rule nisi for his discharge.

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this action, and praying his discharge. A this detainer was lodged, the defendant wa imprisoned, and could not be lawfully charg cution by the party at whose suit he was s detained, or by any other person; *Collins* v. [*Maule* J. referred to *Robinson* v. *Yewens* (*b*), *dal* C. J. to *Barratt* v. *Price* (*c*), and *Pears ens.* (*d*)]

TINDAL C. J. According to the practic court, a prisoner is brought up and is commit cution upon non-payment of the condemnati without any motion being made to charge him tion. The defendant must, therefore, be co execution; and the application on his behalf n a rule calling upon the plaintiff to shew cau should not be discharged out of custody.

A rule *nisi* was granted accordingly; whic afterwards abandoned by the defendant, no cou instructed to support it. (*e*)

Rule disch

(*a*) 10 *A. & E.* 570., 2 *P. & D.* 439.

(*b*) 5 *M. & W.* 149., 7 *Dowl. P. C.* 377.

(*c*) 9 *Bingh.* 566., 2 *B. Moore & Sc.* 634.

(*d*) 5 *New Cases*, 489. 567., 7 *Scott*, 435. 701., 7 *Dowl. P. C.* 451.

(*e*) In order to rule, it would have sary to shew collus *Aldridge* the plai action and *Robins* fendant in equity. v. *Faber*, 2 *B. & A*

(*g*) And see *Wr ford*, 1 *Dowl. N. S*

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N *v.* POTTER and HORSFALL. *Nov.* 18.

n infringement of the plaintiff's patent, in improvements in cards, for carding and other fibrous substances, and for e of woollen and other cloths." The er profert of the letters-patent bearing f *March* 1834) averred the due making n and the inrolment thereof, and alleged

To a declaration for the infringement of the plaintiff's patent "for certain improvements in cards for carding wool, cotton, &c., and for raising woollen and other cloths," the defendants, in their third plea, nvention was not new at the time of the granting of the fourth plea, after setting out the plaintiff's specification, *in* ein it was stated that the improvement was applicable to p-cards,), averred that such cards were ordinary cards at the , and also that the plaintiff's invention was unfitted and use- e of such cards. Notices of objections, corresponding with the leas, were delivered in by the defendants, but none that pointed the invention *to form the subject of a patent.*

judge, in summing up, left the points to the jury in the terms es, but gave no opinion as to the validity of the patent. He l by the defendant's counsel to put two other questions to the not distinctly raised by the issues, but he refused to do so. at this refusal was proper.

upon the issues (taking into consideration the notices of ob- e would not have been warranted in giving any opinion as to e patent, in respect of the fitness of the invention to form the t.

the statement of the specification in the fourth plea, being inducement, it could not be taken advantage of in arrest of n the ground that the invention therein described was not the tent, (*dubitante Coltman J.*)

e proper way to have raised that question would have been to ged invention, as set out in the specification, was not a new in the meaning of 21 *Jac.* 1. *c.* 3.

hether, sup- ff's letters pa- to be invalid n set forth in he defendants

would not have been entitled to pray judgment for themselves *non obstante veredicto,* instead of simply arresting the judgment prayed by the plaintiff.

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that the defendants, after the making of
patent, had made, sold, and exposed to sale
wit, &c., cards for carding wool, cotton, &c
tion of the said invention of the plaintiff,
thereby hindered and prevented the plaintiff
use and enjoyment thereof.

The defendants, after setting out the lett
upon oyer, pleaded — first, not guilty.

Secondly — That the plaintiff was not th
first inventor of the alleged invention in the
mentioned, *modo et formâ*.

Thirdly — That the alleged invention was
to the public use of it in this country; but h
contrary, been publicly used in *England* b
1st of *January* 1824 and the time of granting
patent; and that, by reason of the premis
statute in such case made and provided (*a*),
patent were and are wholly void; verificatio

Fourthly — That the supposed instrument
under the hand and seal of the plaintiff (th
tion), and inrolled as in the declaration men
and is as follows; that is to say, "To all to
(after reciting the grant of the patent, with t
as to inrolment the specification proceed
Now know ye, that in compliance with the sa
I do hereby declare the nature of my inventi
sist in the application and adaptation of th
known by the name of india-rubber as a su
the fillets or sheets of leather which are com
in the construction of ordinary cards, and th
superior elasticity and durability to such card
further compliance with the said proviso, I
describe the manner in which my said inventi
performed, by the following statement thereo

(*a*) 21 *Jac.* 1. *c.* 3.

he drawing annexed, and to the figures rked thereon." Then followed a descrip- ng representing "an elevation of a card ith an india-rubber foundation or fillet, ire dents or teeth are inserted." And the istance or uniformity of the dents or teeth found to be better preserved by a piece only called brown holland, or other the glazed, and cemented on the back of the he cloth, when fastened to the india-rubber ep the dents or teeth more firmly in their use; and, the foundation or fillet being much stiffer, the action of the dents or certain in their elastic movement. The ted to the india-rubber, is to be affixed or board of the ordinary carding engine f it is to be affixed by cementing, then it remove the cloth, which, in this case, slightly attached to the india-rubber, e found the best mode of applying the When the cards are constructed by ntial that the *cloth* should be *first* pricked as is the practice when leather is used) to distance and required uniformity of the ; and in cases where cloth is introduced ayers of india-rubber, the india-rubber is ced in a similar manner, to enable the force the dents or teeth through it with- r injuring their form or shape; but the holes may be effected by the patent ma- *Dyer* of *Manchester*, now in use for that en I mention cement in this specification, to what is now generally called india- , and which, as it has now become an eral sale, and may be bought by that ot think it necessary further to describe

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But as the machines for cutting india-rubbe generally known, and as I prefer india-rubb state in which it is imported, for my purpo now describe the means which I use for c india-rubber into layers from the solid bloc ported, and which I recommend in preferenc is termed manufactured india-rubber, or in first dissolved by some known solvent, and th moulds to form blocks, the former being mo for the purpose." Then followed a descripti process for cutting the india-rubber from the thin layers. "The pieces thus cut off may together to form fillets or sheets, according to of the card intended to be made, and, whe or dents are set therein, may be nailed to the the usual manner, or cemented on it." Afte description of the apparatus for cutting, t cation proceeded: "I lay no claim to the c paratus hereinbefore described, as I have onl as the best method I am at present aware o the purpose." Then followed a description paratus for grinding or pointing the wires fo cards, which was stated to be used "in eve similarly to the circular emery-strickles or cylinders in ordinary use." "The advantages by cards of this construction consist in th elasticity of the india-rubber allowing the teeth to be pressed down without material inj card; at the same time the dents or teeth are firm to perform the carding or raising opera even though the dents or teeth should be pre to the surface of the india-rubber of the would not be bent, but would immediately re former position, by the elasticity of that Again, in substituting cards of this construct place of teazles, or ordinary wire cards, for th

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e pile of woollen and other cloths, I am en-
k them wet without any material variation
city of the india-rubber, which remains
n in its action, and effects the operation
e pile of woollen and other cloths more
d without that variation experienced from
its transition from a dry state to a state of
d, by varying the thickness of the india-
enabled to gain a delicacy of action in the
o raise a nap or plush on fine silk fabrics,
the ordinary woollen cloths, finished by
and in all cases where the cards are worn
-rubber is worth nearer its original value
er material heretofore used for a similar
ne india-rubber I usually employ is about
an inch in thickness for raising purposes;
vary according to the length of wire of
th are formed, and the quantity of elasticity
e thicker the india-rubber and the shorter
greater will be the stiffness. Having de-
nature of my invention &c., together with
n which the same is to be performed and
ffect, I hereby declare that I do not claim
r method or means of setting or placing
teeth of the cards; nor do I claim the
described for pointing the cards; but have
various parts as the means I have pursued
answer in effecting my improvement in
do hereby confine my claim of invention
ation and adaptation of india-rubber as the
t, or medium, in which the dents or teeth
together in the manufacture of cards, and
ning a superior elasticity and durability to
ove described. And such my invention
best of my knowledge and belief, entirely
o hereby declare this to be my specification

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of the same &c. Wherefore I do hereby
maintain exclusive right and privilege to my sai
tion." The plea then averred that certain she
and top-cards were, before and at the time of
the said letters patent &c., cards for carding co
within the meaning of the said letters-patent an
said specification, and during all that time
dinary cards within such meaning, and in gen
known use; and that the said invention was
and useless for the purpose of the construction
cards and top-cards, or either of them, as clai
described in the said letters-patent and speci
wherefore the said letters-patent were and are
plication.

Fifthly — That the plaintiff did not, in and
supposed instrument in writing so set out as a
particularly describe and ascertain the nature
said invention, and in what manner the same w
performed, within the meaning of the said letters
verification.

Sixthly — Leave and licence.

Replication; to the first and second pleas, s
to the third plea, an affirmative traverse of the
tion, that the invention in the declaration m
was not, at the time of making and granting th
patent, a new invention as to the public use a
cise thereof in *England*, concluding to the cou
the fourth plea, *de injuriâ*; to the fifth plea, a
ative traverse of the allegation, that the plaintiff
in and by the said instrument in writing, par
describe and ascertain the nature of the said i
and in what manner the same was to be pe
concluding to the country: to the sixth plea, a
of the leave and licence.

The notice of objections to the patent (*a*) (

(*a*) *Vide antè*, Vol. I. 249.

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& 6 *W.* 4. *c.* 83. *s.* 5.), as amended under
r, was as follows: —
ndants in this action, besides denying that
inged the letters-patent in the declaration
ean, at the trial of this action, to rely also
ng objections; that is to say,
patentee was not the inventor of the al-
n &c.
alleged invention was not, at the time of
f the letters-patent, new; and that it had
hen publicly known &c.; and that what
t as an improvement, is none, and is of no
ne machines for the same purpose publicly
ime of the patent.
ers-patent were granted to one *Thomas*
r about the 24th of *November* 1824, and
ut the 15th of *March* 1825, for (amongst
a new and improved manufacture which
y cases, be used as a substitute for leather;
e novelty, or a material portion thereof,
e contained in the letters-patent in the de-
tioned, is to be found in the letters-patent
ncock.
rs large quantities of the artificial leather
under and in pursuance of the said letters-
l to *Hancock*, had from time to time, after
the letters-patent to *Hancock* and before
the letters-patent in the declaration men-
made into cards, and used for that pur-

letters-patent granted to *Hancock* having
now the common right of every subject to
per solution or cement combined with cloth
fibrous substance, in any way or for any
hich leather, before the grant of the letters-
cock, had been commonly applied.

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"That the alleged invention &c. is not a ne facture, for the further reason that neither mentioned in the letters-patent, nor the ind nor the pricking the same for the insertion of or teeth, are, nor is any of them, new.

"That the alleged invention is not adapted useless for, the construction of sheet and which are known kinds of cards, and for th of obtaining a greater degree of durability to alleged.

"That the specification does not describe t invention of the plaintiff truly and sufficient insufficient and ambiguous in the following re

"That the specification is insufficient and in not stating or shewing with certainty how holland cloth is to be cemented to the ind whether after or before the wire teeth have bee through the india-rubber.

"That the specification does not describe the brown holland is to be used; it being es the manufacture of the cards that there shou folds of brown holland at the back of the card

"That the specification is also uncertain guous in this, that the plaintiff, towards the thereof, thereby declares — 'I do hereby c claim of invention to the application and ada india-rubber as the fillet, or sheet, or medium the dents or teeth are to be set together in t facture of cards, and thereby obtaining a sup ticity and durability to cards, as above describ if the words 'as above described,' are intended to the whole sentence in which the claim of in set forth, then the specification is bad as point claim more extensive than that defined and by the specification; and if the patentee mean all and every sort of way of applying and

as the fillet, sheet, or medium, then he specification, to have set out and commu- sort of way.

claim of invention in the plaintiff's spe- kes no mention of any use or application ; therefore that the statement in the spe- ching the use of linen cloth, is calculated to

invention claimed by the letters-patent in n made, is not of any public use or benefit, india-rubber, uncombined with cloth or substance, is too much affected by the tem- which it is used, to be a useful or sufficient leather.

alleged invention is not of any public use far as the same purports to be an improve- for raising the pile of woollen and other g wholly useless for that purpose.

e specification does not sufficiently shew rds or top-cards can be constructed so as improvement over those previously in use, ny utility, or how a greater degree of dura- s can be obtained than previously.

the parts of the supposed invention of the e known, used, and practised before the ent mentioned in the declaration, and were sed by *T. Hancock* of &c., the person men- as having had letters-patent granted to by divers other persons in divers parts of d that the material portion of the novelty ned as supposed to be contained in the in the declaration mentioned, and said to the letters-patent granted to *Hancock*, is, on and adaptation of india-rubber as a sub- ather, and for the fillets and sheets thereof."

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The cause was tried before *Tindal* C. J. and jury, at the sittings for *Middlesex*, after last *Hil*

Evidence was given of a very considerable fillet cards manufactured pursuant to the plain tent, from 1838 to 1840, and of a purchase f defendant in *November* 1839, of the material, th which was alleged to be an infringement of th tiff's patent, and for which material they had ob patent in *April* 1839. Many witnesses were c prove the novelty and utility of the plaintiff's in and its great superiority over leather, in form backs or foundations of cards for carding woo the leather card deriving its elasticity almost ex from the wire dents or teeth, whereas the card factured according to the plaintiff's method additional elasticity imparted to it by the indi (so that the teeth were enabled to yield, withou ing, to any passing obstruction, and immediatel sume their proper position), and was also of uniform and durable texture; and that it was applicable to, and useful in, the construction c cards and top-cards as to fillets; but no disti dence was given of the *actual use* of the article f cards and top-cards until after the commence this action.

It appeared also that the difference between th manufactured under the plaintiff's patent, a manufactured under the defendant's patent was, the former, the india-rubber was cemented, in s from the solid block, to linen cloth, in the man scribed in the plaintiff's specification, and that t consisted of cloth of a peculiar fabric, saturate pregnated by passing it through a liquid comp india-rubber dissolved in naphtha, or some similar and afterwards drying and submitting it to press

It was proved also that a workman of compete

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make the article described in the plain-
ation, by following the direction therein
at it differed materially from that described
specification, inasmuch as the solution of
ber and its incorporation with the other
erein mentioned would entirely destroy its
at the material made under *Hancock's* pa-
lly unfitted for card-making, and that it
been tried for that purpose, and had failed;
e article made by the defendants was a
itation of that made under the plaintiff's
oth being merely placed in the centre be-
ata of india-rubber instead of at the back,
-rubber, though applied in solution or in
ement, being capable of being reproduced
n of the solvent, and the principle and the
methods being the same, viz. the acquisi-
reased elasticity, though the modes of at-
esult were somewhat different.

e plaintiff's witnesses considered that the
t an *essential* ingredient in the patent,
sirable one, as it greatly facilitated the
oricking and the insertion of the teeth, and
h might afterwards be removed, and the
back might be then cemented to the block
ith india-rubber cement, instead of being
eto with tacks: but the majority of the wit-
this to be impracticable, or, if practicable,
s.

rt of the defendants, the following patent
— one granted to *Thomas Hancock* on the
mber 1824, a second to the same person on
March 1825, and a third patent to the de-
he 20th of *April* 1839.

t of *Hancock's* first patent, which was "for
making or manufacturing an article which

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may be in many instances substituted for leat
be applied to various other useful purposes,"
described in the specification: "The nature o
vention consists in combining together the
filaments of various matters, such as flax, hemp
wool, hair, or other matters of the like flexibl
by saturating them, in connection, or in cont
each other, with a liquid which, when partiall
rated, becomes a flexible and adhesive substa
fibres being previously arranged or disposed, as
and dimensions, according to the purposes
they are to be applied, so as to produce a unifo
bination of the fibres and the substance, or i
manner as that every individual fibre may be
rounded with the said substance, as that the
the fibres composing the mass, when united by
stance, may form a compound or article some
sembling leather, and which compound subs
article may, in many cases, be substituted fo
more or less advantageously." The specificat
stated the purposes to which the application
applied, namely, harness, boots and shoes, we
parel which it might be desirable to have w
&c. It then proceeded to describe the m
making the article and the manner in which t
tion was to be performed, premising that, in t
several substances having short fibres or fila
was expedient to employ the carding machin
some other cases to use the operation of fe
which means the patentee was enabled to obta
of fibres of uniform thickness and of any conv
mensions as to length and width.

The specification then proceeded to state th
of applying the invention in the following terms
one or more of such layers or fibres, acco
the required thickness of the article when m

em upon a flat board. When the thickness to be made requires more than one of fibres, I spread them out upon a flat re mentioned, layer upon layer, until the npleted. I then sprinkle the whole with water (but the latter answers best), at the ress the layers together until the whole rmly wetted: in this state they are placed flat boards, or flat plates of any suitable posed to strong pressure, in a screw or r by pressing the said boards or plates to- he layers or fibres between them, through pair of rollers. By this means the whole become more uniformly wetted, and the ater is expelled or got rid of. The said been thus wetted, are now ready, or in a o be saturated with the liquid which forms nd adhesive substance hereinbefore men- he time of applying the same it is in a and I saturate the layer or layers of fibres first pouring a proper quantity of it upon the said layer or layers; and I spread the said layer or layers with a smooth spatula or instrument, made of wood or other proper by gently pressing the said layer or layers the spatula &c., the liquid is made to sink with, and pervade the whole mass of fibres e said layer or layers. I also perform the n of saturating in a more convenient man- g the said layer or layers of fibres in a h with a flat and level bottom, and by greater quantity of the said liquid may be he layers, as the sides of the trough will ning to waste, and the fibres are thus more ed by dabbing or pressing them with the la. A trough may also be advantageously

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used for placing the layer or layers of fibres in, are to be wetted with water as before describe the layer or layers of fibres has or have been saturated with the liquid, I place it or them board, in an inclining position; and, in order or press out any excess of the liquid, I pass roller over the surface of the layer or layers at the same time applying a sufficient force, b otherwise, to the roller, to force, or squeez liquid. This operation may be carried on by the layer to a strong mechanical pressure, if The process having been carried on so far, th layers of fibres now requires or require to b therefore now place the said layer or layers o a room heated to eighty or ninety degrees o ature, and allow it or them to remain there they are nearly dry, or until the liquid becom glutinous, and adhesive. The layer or layers being thus dried, I expose it or them again to pressure, by which the whole of the fibres ar into closer contact with each other and with posed substance, so as that the said fibres are adhere firmly to each other. If, on exposing or layers to pressure for the first time after be I perceive that any water or fluid matter exu driven out by the pressure, I conclude that drying has not been continued long enough; I place the layer or layers of fibres in the warm second time, and afterwards subject the said layers to a second pressure. It is in some ca site to give a smooth surface to the article; a effect by polishing the surfaces of the plate which the dry layers are pressed for the last t liquid I use for this purpose hereinbefore me brought into this country, and said to be the tained from certain trees which grow in severa

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a, the *East Indies*, and other places abroad.
n Mr. *William Nicholson's Translation of eneral System of Chemical Knowledge*, that btained in *South America* from a tree called

e or liquid I have made use of was obtained *merica*, and from my own experience I find juice or liquid, when exposed to the open , or in a warm room, becomes inspissated then forms a substance exactly resembling, believe to be identically of the same nature s the same properties with, the substance y the names of caoutchouc, or india-rubber, n, and it is employed abroad for that pur-

second invention, as described in the spe- nsisted "in filling, saturating, and combin- fibrous substances, in their manufactured factured state, with a composition which fibres sufficient flexibility, and, at the same and consolidates them into one mass, easing their strength and durability, and these means a manufacture which may, in es, be substituted for leather." The process this second specification differed from that the former one, principally in this, that a ne of the compounds hereafter described, pon a piece of stained cotton cloth, or some rial, that a layer of carded cotton, similar to s then spread over the compound, and over otton another piece of cotton cloth, and that hen submitted to pressure, and afterwards compounds used for this purpose were ed: "No. 1. I take two pounds of caout- ved in one gallon of equal parts of oil of nd highly rectified coal tar oil, six ounces

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of black resin, two pounds of strong glue siz
pound of ochre, powdered pumice, or whitin
the whole together; or No. 2. one pound an
caoutchouc, dissolved as before stated, one
strong glue size: I melt and mix the resin an
water or steam bath, and add the other i
stirring the whole until it is mixed through
solution of the caoutchouc is expedited by
steam bath, and the undissolved portions ma
rated, by straining it through a fine wire or
The mixture, No. 1., is applicable to arti
stiffness and cheapness are required. No. 2.
able where pliancy and strength are more
But the proportions above mentioned may
according to the different applications of the
be manufactured. If varied qualities of
cheapness be desired, the proportions of size
ing may be increased till they make up one t
mass. If flexibility be required, the quant
solved caoutchouc in the compound No. 2.
creased, and especially where great strength a
are required. This last is also preferable
that are to be much exposed to the weather."

The specification of the defendants stated t
to be for "an improvement &c. in cards f
various fibrous substances, part of which im
was to be used as a substitute for leather;
nature of the alleged invention was stated "to
the manufacture of a new material or substan
ceiving the wire teeth which have hithert
most part, been set in leather, &c. In the
we provide a woven fabric of a peculiar co
which we manufacture as follows: — We ma
or chain, of a material possessed of the greate
strength and the least elasticity, such as yarn
made of flax, hemp, or cotton; which yarn or

made of two or three folds or strands wisted together. The warp being in the be made into cloth by being shot or wefted veft, that is, with yarn or thread composed ool." The specification then stated the ansing the cloth after it was woven, and d as follows: —

thus prepared is passed through a solu- ubber, known in the trade as india-rubber nent; and in the passing of the fabric, a e varnish will adhere to the surface, and his state is wound tightly up and allowed v minutes, then is unrolled and passed a hrough the varnish, by which means a still rtion of the india-rubber varnish will ad- oth, and being again tightly wound up it a sufficient length of time to allow the netrate or become absorbed by the cloth. necessary to pass the cloth a third time varnish, after which we generally find that turated; and, being again left as before in whole now becomes equally and completely the varnish. Its being in this state may the cloth assuming a semi-transparent ap- he coil is then unwound and exposed to re so as to allow the varnish to dry, after to be drawn once or twice through the which the cloth will imbibe a further por- as to fill up the pores or interstices which of drying has left open. If this process perly conducted, the fabric will now con- y one third india-rubber and two thirds ght; but these quantities may be varied. ubber varnish or cement being an article freely purchased, and the modes of pre-

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paration being well known, it is unnecessary f
particularise it.

"The preparation of our improved mater
thus far completed, we next cover it on each
a mixture of ochre and weak size, which, by d
the adhesiveness of the india-rubber, facilitates
sequent operation of inserting the wire teeth,
gives to the fabric more of the appearance o
When this coating is dry, the compound fa
duced by the operation above specified, is to
between a pair of weighty rollers, or otherwise
to a considerable pressure, by which means t
becomes firmer and more compact, and, in s
comes possessed of the qualities which per
quainted with the card-making business know
highly desirable; namely, that of being extreme
in the direction of the thickness of the fabric,
impart as it were the elasticity to the wire te
set, which, in the direction of its length or
non-elastic. In this state it is ready to receive
which is to form the cards, for which purpose
using the card-making machinery; and the
being exactly the same as that now in use fo
leather cards, simply substituting the fabric
above described in the place of leather, it nee
described here.

"Though the process above described is the
generally prefer for carrying out our inven
sometimes vary the process in the following
which may, in some cases, be considered prefe
Instead of the fabric above described, composed
of flax, &c., we use in this case a fabric comp
tirely of sheep's wool, and milled to such an ex
one yard in length by twenty-seven inches in wi
weigh ten or twelve ounces avoirdupois, or ther
this cloth is to be saturated with the india-r

eady described, and afterwards cemented rubber varnish to a back of strong cloth the warp in the former case, of flax &c., intended as a substitute, in order to pre- al stretching. The exposed surface of covered with a coating of ochre and afterwards the whole fabric being sub- derable pressure, &c., the process is com- abric is now ready to receive the wires."

cation, having then described a way of last process by means of machinery, to- e machinery employed by the patentees , concluded thus: —

claim any of the machinery, &c. &c.; but t our invention consists — first, of the cing a cloth or fabric by combining d india-rubber together, with a third ma- ird material may be either flax &c. &c.; eing peculiarly adapted to the making and also as a substitute for leather &c.; aim as our invention the application and the woollen cloth, milled or fulled to a ss, and afterwards saturated with india- mented, on a back of strong cloth com- &c., as a substitute for leather in the e cards; and, lastly, we are aware that tions of fabrics have been coated with nd have, or may have, been used as a eather, and have, or may have, been em- king wire cards; we do not, therefore, ng of fabrics in general with india-rubber, eculiar fabric above described."

l by several witnesses that the principle ctures respectively described in the spe- he plaintiff and defendants was essentially ll in the materials used and the mode in

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which they were combined, as in the result of t
bination; the effect of the former being to give
and of the latter to give strength and flexibilit
parting only a very slight additional elastici
card: that the proportions which the india-ru
to the cloth as used by the plaintiff was gener
three to one, whereas the proportion of th
used by the defendants was from 20 to 40
only; and that india-rubber, as imported, was w
for the purpose described in the plaintiff's sp
They also stated their opinion that the ma
scribed in the plaintiff's specification, though
fillets, could not profitably be used for *shee*
top-cards, by reason of the difficulty in applyi
quisite degree of lateral pressure to make i
to the cylinder or block; but none of these
had seen them so used.

One witness proved that in 1826 he had m
with backs of *Hancock*'s material; that he s
siderable quantity, and that he would have co
use the article as a substitute for leather, but
ficulty in the insertion of the dents or teeth th

Mr. *Thomas Hancock* and others proved
cock's patent leather had been used for card-
did not, however, appear to have answered th
for which it was applied.

These witnesses further stated, that, in t
ment, it was not practicable to use cards wit
of india-rubber alone; and that upon the fa
plaintiff's specification it was doubtful wheth
the teeth were intended to be passed through
back.

The Chief Justice, having summed up t
the jury, left the questions to them in the
the several issues upon the record; but he di
any direction as to the validity of the plaintif

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en requested by the counsel for the de-
ask the opinion of the jury upon the fol-
tions — first, "whether the mode adopted by
nts, of saturating cloth with dissolved india-
not known to *Hancock*, and practised by him,
ate of the plaintiff's patent;" — and, secondly,
r not, if the dents or teeth were fixed in the
e sheet of india-rubber), and then cemented
der, without any linen at the back, it would
purpose of a sheet-card." His lordship,
clined putting these questions.
found for the plaintiff upon all the issues.

Serjt., in *Easter* term last, obtained a rule
a verdict for the defendants, — or to arrest the
pon the ground that the alleged invention,
the specification set out in the fourth plea,
h an invention as could sustain a patent), —
trial, upon the ground of misdirection, in the
direct the jury as to the validity of the
the refusal to put the questions suggested by
for the defendants, and that the verdict was
ence.

Vilde and *Bompas* Serjts. (with whom was
ow shewed cause. They referred to *Haworth*
le (*a*) and *Boulton* v. *Bull.* (*b*)

Serjt. (with whom was *Cowling*), in support
cited *Brunton* v. *Hawkes* (*c*) and *Saunders* v.
[The arguments used on both sides, are
and commented upon in the judgment.]

C. J. As this motion is, in effect, an appeal
rection to the jury at the trial of the cause,

New Ca. 182. (*c*) 4 *B. & Ald.* 541.
I. Bl. 463. (*d*) 3 *B. & Ad.* 881.

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I shall say but little upon the present occasion. I am bound, however, to state generally the which I have formed of the case.

The motion, it appears, proceeds, first, upon th that the verdict is against evidence; secondly the progress of the cause there was a misdire my part, to the jury; and, thirdly, that upon of the record there appears that which shews alleged invention is not the subject-matter of within the statute 21 *J.* 1. *c.* 3.

As to the first point, the whole matter was d the trial, at great length and with great abilit counsel on both sides, and every point was th submitted to the jury. The evidence, of wh was a considerable body, was fairly before the j were to form their opinion according to the pr ance of that evidence; and I see no reason to satisfied with the conclusions at which they Upon the first plea of not guilty, the jury wer whether the article made and used by the d was virtually and substantially the same as scribed in the plaintiff's specification; and t found that it was; this being a mere matter of f which they had ample means of forming a ju Upon the two next pleas the question was, whe article described in the plaintiff's specification w invention, or whether it was known and in pu before the plaintiff obtained his patent: the ju that it was new and was not known in *Englan* that patent; and as *Hancock*'s patent was plained to the jury, I see no reason for setti their verdict upon this ground. There is only material issue, namely, whether sheet-cards cards were useful or not, according to the adaptation described in the plaintiff's spec Upon this, also, the jury found for the plaint

ce of the actual user of sheet-cards and top- although the user was since the action was s still pertinent to the question. To this ence on the part of the plaintiff, that the uld answer for sheet-cards and top-cards, opposed on the part of the defendants nent and belief of their witnesses; and that to induce me to set the verdict aside.

the misdirection. The grounds that have out in the argument, I take it, are these; declined putting to the jury two specific on which, at the close of the summing up, or the defendants wished me to ask the e jury; and, secondly, that I ought to have at the thing described in the plaintiff's ecification was not the subject-matter of a the statute.

irst ground, it appears, I think, to have been ted in argument that I was not bound to ry every specific question that might sug- the minds of counsel. If, in the course of there were any points which I had over- which I had omitted to call the attention of ould have been proper to remind me of them, st that they might be put more specifically but it would be very inconvenient, after a n fully presented to the jury, to call upon swer insulated questions. Such a course ful, perhaps necessary, in some cases; as cision of the jury may proceed upon two e distinct from each other, and it may be know upon which they find their verdict. se, with the consent of the parties and of not otherwise, it may be useful to ask the they are satisfied that such a point was e affirmative, or to answer some question

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according to the circumstances of the case, up
the verdict may turn; but this is a discretion
appears to me, should be very sparingly exerc
cause otherwise, if the one party were permitte
his questions put, the other party would have
right to present some upon his part; and t
quence would be, the finding not of a specia
bringing all the facts before the court, but
insulated facts which might tend to produce
and confusion rather than to assist in ascerta
matters in issue between the parties. I do
therefore, that, under the circumstances of t
acted improperly, or, indeed, unwisely, in de
put the proposed questions to the jury.

Then, as to the second ground of misdire
there had been an issue on the record invo
validity of the patent, I admit I should have b
to state my opinion upon it to the jury on
the other; but, looking at the issues as they s
not find one that raises the question wheth
sense in which it has been argued to-day, thi
manufacture" within the meaning of the
James; that is, in effect, whether the invention
for which, in law, a patent could be granted,
stance, whether it was merely an abstract prin
embodied, or not involving any new combinati
cess to carry it into effect. The issue that a
the nearest to this point is the third, namely
the invention was, at the time of granting th
patent, new as to the public use and exercise
England; but that leads to a very differen
from whether the invention was, within the m
the statute, a manufacture for which a patent
obtained. The issue takes it for granted
a manufacture, and only raises the question, w
was in public use and exercise, at the tim

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re is another reason that would equally me from giving any opinion as to whether anufacture, namely, that in the notice of ivered under the statute of *William* IV., one that points to the invalidity of the respect, the objection as to the novelty of pointing only to the same objection that is third plea. Upon both of these grounds, hink I should not have been warranted in tting that objection to the jury.

ect to the last question, — whether this ob- patent, that is, that the invention is not the r of a patent, appears upon the record, so y be assigned or the judgment may be ar- question can only be raised upon the fourth the specification is set out as matter of in- an allegation that sheet-cards and top-cards y cards within the meaning of the letters- ecification, and in general and known use, plaintiff's invention was unfitted and useless se of the construction of sheet-cards and either of them, as claimed and described ff's patent and specification. Now the jury that issue in favour of the plaintiff, the de- not afterwards turn round and treat that ly matter of inducement and not in issue, ve allegation of the invalidity of the patent. sons, therefore, I think the rule must be

J. I also think there is no sufficient ground l. As to the first issue — whether or not ts were guilty of an infringement of the ent — the main pressure of the argument, nd it, has been this, that they were misled, duced to consider that the question for

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their determination was, whether the ma article of the defendants was an imitation of factured article of the plaintiff, rather than was an infringement of his patent; and that w chiefly upon this, that it was treated, as it is if the use of the non-elastic linen at the b card was an essential part of the patent. It i it was not so; for that the patent was mere application of the india-rubber as the fillet the cotton or linen at the back forming no ever of the patent, but only a part of the ma article which is produced. But I confess accede to that view of the matter; for the ter specification are — "I confine my claim of to the application and adaptation of india-r the fillet or sheet or medium in which the teeth are to be set together in the manufactur and thereby obtaining a superior elasticity bility to cards, as above described," — and th to me to involve, not merely a claim to the us rubber, but to the application or adaptation o stance to the reception of the dents or teeth at the back of it a linen cloth, which was pro an essential part of the manufacture; for, alt cloth may be afterwards removed, the inserti dents or teeth in the india-rubber appears to rially facilitated by the addition of the non-ela to which it is attached. It appears to me, that there is nothing in this argument that me to say the jury were misled, or were induc an erroneous view of the matter, when they fou defendants were guilty of an infringement. second plea, that the plaintiff was not the tru inventor, it appears to me that it was satisfacto that the plaintiff was the inventor. As to the which raises the question of novelty, it is sa

not new, in respect of its similarity to the under *Hancock*'s patent. I think the an- s been given by my lord to that argument actory, and that any other verdict than that y found upon that point would have been th regard to the objection that the plain- n was unfitted and useless for the construc- cards and top-cards: it also appears to me had good grounds for the conclusion they that point. It is alleged in the fifth plea, ription of the invention in the specification t. Upon that very little stress has been rgument; and I think, upon the whole, round for saying that a person competently l find any difficulty in understanding from ion what it is that the patentee claims as .

ect to the misdirection, the first objection to s direction is, that he declined to put cer- ns to the jury. Those questions, though oundation of arguments in the course of the not the issues to which the attention of the roperly be directed. They rather seem to ggested for the purpose of betraying the ort of inconsistency in the verdict which find, than as being really calculated to ad- ir trial of the cause. By a very dexterous tting a question, there may be an apparent between the answer given to it and the ding of the jury, when, substantially, they derstood, — with all that reasonable degree and accuracy with which juries can ever be understand questions of this nature, — the g of the case before them.

question, whether the sufficiency of the spe- upon the record, I own I do not feel at all

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confident. In substance, the defendants have plea which, if good, is an answer to the ac they have added to it some immaterial allegati suming that the specification is bad, I am r posed to think that the objection does appear record, and that this plea *would* raise that Although the parties have gone to trial immaterial issue, I do not feel confident th plea were good, the right course would be judgment against the defendants upon that iss it appears to me that the plea is not good, I think the patent is a valid patent. Upon consideration I can give the subject, it appea that this is a very useful application and adapt substance, the properties and qualities of which particular purpose, had never been known bef therefore, that it was properly the subject of and, if it were properly the subject of a paten seems immaterial to consider whether the ques or does not arise upon this record.

ERSKINE J. I also am of opinion that this be discharged. The defendants insist that the claimed by the plaintiff in his specification is n the subject-matter of a patent. Whether should be entered for the defendants, or a had, depends upon the same question, namely, there is any issue upon the record properly a raise the point; for if there be no such issue record, the omission to state to the jury that th tion described in the specification either was o legally the subject of a patent, cannot amount direction; and, of course, no verdict could, un circumstances, be entered for the defendants. pears to me that there is no issue upon the r raise the question whether the plaintiff's allege tion was or was not the proper subject of a pat

relied upon for the purpose—the third—
t, as it might have done, that the alleged
not a new manufacture within the statute,
he question of law might have been raised
it merely avers that the alleged invention
e time of making and granting the letters-
invention as to the public use and exercise
gland—substantially admitting that it was
acture as might properly be the subject of
insisting that it was not a new invention.
on whether judgment should be arrested (*a*)
upon the proper construction and effect
plea; next, upon the legal effect of the
here set out, supposing the plea to be suf-
the question of law. I agree with my lord
hat this plea is not sufficient to raise the
and therefore, as to the legal effect of the
(a question certainly of considerable diffi-
forbear to offer any opinion. The plea sets
fication, and avers that the invention was
he construction of sheet-cards and top-
his plea, it was open to the plaintiff to
ing that the specification therein set out
ification inrolled by him, or by traversing
as to the uselessness of the invention.
n the latter course; and, for the purpose
utility of the invention, he admits that the
set out in the plea is the specification in-
n, but he does not admit it for any other
and therefore we are not at liberty to look
ation, as set out in that plea, for the purpose
g whether or not the patent is good in law.
efendants claim to be entitled to a new
n the ground that the verdict was not war-

e, 411 (*a*). (*b*) Vide *Sweet* v. *Lee*, *post*, 452.

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ranted by the evidence, or on the ground that were improperly directed, so that they had n portunity of considering the evidence in its pr

[His lordship then went minutely over th with reference to the different issues, and opinion that the verdict was correct and ought

But then it is said that the conclusion of the ju result of a misdirection. The objection to his direction is, that he refused, after having full up the case upon the various issues of fact r the record, to put to the jury certain questions suggested by the defendants' counsel. It app that those questions were substantially submi jury as far as was justified by the record; and no part of the judge's duty to put them in the was suggested. If the request of the defendan had been complied with, the plaintiff's cou have been equally entitled to call upon his l present the case according to their particular then there must have been a second summing these supplementary questions, a course that much have tended to the enlightenment of Upon none of the grounds suggested, there think the defendants entitled to have their absolute.

MAULE J. I also am of opinion that this be discharged. That part of the rule which p new trial on the ground that the verdict is not by the evidence, depends in some degree upon in which the issues are to be understood.

As to the first issue, it is necessary to con was the subject of the defendants' patent; for in substance the same as the article for which tiff's patent was obtained, the defendants guilty of an infringement of that patent, and t

F, upon that issue, cannot be impeached. ification the defendants claim to be the new material for forming the backs of ey describe the mode of preparing it to dly passing a woven fabric of a peculiar hrough, and saturating it with, a *solution* r, and then drying it in order to evapo- nts, and leave the fabric impregnated and ndia-rubber, and afterwards submitting it and the object they describe as being, to ric so dealt with "extremely elastic in the ne thickness of the fabric, so as to impart, sticity to the wire-teeth when set." That producing, by a circuitous process, a cloth -rubber on each side of it, so as to give a ticity to the basis of the dents or teeth of ne plaintiff, by his specification, claims the t of making cards with india-rubber as neet, or medium, in which the dents or teeth — the object being, like that of the defend- inment of a superior degree of elasticity : and, in describing his mode of attaining ne states that he inserts the wire-dents or ndation or fillet of india-rubber — a slice er in its natural state; and that, with a ve the regularity of distance and uniformity r teeth, and to render their action less un- ements to the back of the india-rubber a n holland or other like cloth. The use of k is, to enable the operation of pricking or e india-rubber to be performed with greater nd regularity. In some instances, where it cement the india-rubber back to the cylin- , instead of fastening it with nails, it is said irable to remove the cloth: but that does ne use of the cloth the less an essential part

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of the original process of putting in the teeth
be so, I think it is clear that the defendants c
a thing falling within the generality of the
claim; and taking that to be so, the eviden
was sufficient to justify the jury in finding, a
to require them to find, for the plaintiff upon

The third plea denies the novelty of the
and the material made under *Hancock*'s pate
on to sustain that plea. That *Hancock*'s
addressed to the same object as that of the
appears to me to be a position that is alto
tenable. The material made by *Hancock* po
elasticity,—that is, in the popular sense of th
and though india-rubber was one of the
parts of the preparation used by him, the c
might as well be called a preparation of size, or
stone, or of any other of the ingredients, as
rubber; for it had entirely lost its distinctive
of india-rubber: the invention was merely
artificial leather.

With regard to the fifth issue, as to the wa
ticularity in describing the nature of the inv
the mode of performing it, it has been very al
that, if the relative is to be construed with re
the last antecedent, so as to make nonsense o
cification, it was not an intelligible descripti
a man is allowed to employ his understand
need not, as it seems to me, be a very ext
understanding, the description is quite intelli
sufficient. I think, therefore, there is no g
disturbing the verdict, as being against eviden

With respect to the arrest of judgment, i
me, for the reasons already given, that the
whether the invention was one that could p
the subject of a patent, does not arise on the
which, together with the objection delivere

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at has been relied on, is obviously pointed want of novelty in the invention. And as plea; that plea, after setting out the specifi- *verba*, merely states that the invention was ie purpose of sheet-cards and top-cards. takes issue upon that allegation; and that found for him. In this state of pleading, ie that the defendants are precluded from uestion, whether or not the alleged in- he proper subject of a patent. Whether, could look at the specification as set out it would be sufficient to raise the point erment, that the alleged invention was not acture within the statute of *James*, is a h we are not called upon to decide. If s meant to raise that question, the plea ntained such an averment. But, assuming ification set out in the plea is not suf- the invention to be a manufacture within may be that the patent is good, or it may ad; for it does not follow that no other was duly inrolled. The plea does not it is the insufficiency of the specification on, or the fact of the invention itself not manufacture within the meaning of the fter an issue, joined upon the only material that plea, has been found against the de- not think it is competent to them to pray troductory matter. The replication only -"I, the plaintiff, deny one fact you have the other facts I raise no question." (*a*) ed being found in favour of the plaintiff, I e previous allegation of the plea quite out on. Supposing the fact had been found

(*a*) *Brancker* v. *Molyneux*, *antè*, Vol. I. 710. 717.

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the other way, and the facts so found were could the party pleading a plea informally, a ing with an allegation of an immaterial fact fact had been found for him, have recourse vious matters in the plea? I apprehend, n opinion, therefore, the question as to the val patent is not raised upon this record; and, co there is no ground for arresting the judgmen

The only remaining question arises upon in which the case was left by the learned judg that the questions suggested by the defenda ought to have been presented to the jury. It times be convenient to put to the jury a ques not strictly upon the record; still, it is an in irregular proceeding, and one that can only with the consent of the parties; and the prac I think, even then, be limited to cases where t to be put is susceptible of a short and easy way or the other. But where it is likely much discussion, and particularly where the presents a considerable number of questio jury to decide upon, I think the practice calculated to advance the interests of the p wrong rather than the interests of justice. necessary, nor indeed is it reasonable to e twelve jurors should arrive at the same co following the same course of reasoning. rule that a verdict cannot be just unless man arrives at the same conclusion, and b road. (*a*) With regard to the particula suggested in this case, it appears to me th might have been answered either way witho the points in issue; or determining the ri parties; and the second had already, in subs

(*a*) *Vide antè*, Vol. II.

e jury. I think, therefore, that there was
, and that upon no one ground can this
ed.

Rule discharged.

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PARSONS *v.* WILSON.

Nov. 4.

A bill of exchange for 19*l.* 2*s.* 6*d.*, drawn in *June* 1840, by *A.* upon *B.*, payable at two months' date to the order of *C.*, is indorsed by *C.* to *D.* In a bill of particulars delivered by *D.* to *C.* in an action between them, *D.* claims, "*August* 1840, cash per dishonoured acceptance and charges, 21*l.* 6*s.* 6*d.*" Variance held immaterial

TUS assumpsit for hire of goods, &c.
irst, non assumpsit; secondly, payment;
for money paid, and upon an account
particulars of set-off delivered under a
contained the following item. "*August*
er dishonoured acceptance and charges,
At the trial before the under-sheriff of
aintiff entitled himself to the verdict on
for 17*l.* 4*s.* In support of the set-off,
produced a bill of exchange drawn the
840 by *E. Peto* the younger, upon and
. *Peto* the elder, for 19*l.* 2*s.* 6*d.*, payable
s after date, to the order of the plaintiff,
indorsed to the defendant; upon which
l proceedings had been taken, and some
incurred. (*a*)

of the plaintiff it was objected that the
ot support the plea as explained by the
id that the date of the bill produced did
the description in the particulars, which
ght apply to other transactions of a similar
which there appeared to have been several
arties. A verdict having been found for
on the plea of set-off,

ion was raised an action against the indorser
e indorsee of a as for money paid to his use, or
can maintain upon an account stated.

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Shee Serjt. now moved for a rule *nisi* for [*Erskine* J. Were there any other bills acc plaintiff?] None were produced which responded with the description in the partic

TINDAL C. J. To entitle the plaintiff to the verdict which has been returned, he s the court that between the particulars of se evidence, there existed a variance calculate that he might have been misled by seeing t "the plaintiff's dishonoured acceptance," in fact the dishonoured acceptance of an the plaintiff standing in the relation of *i* It appears to us that the plaintiff could n misled by the misdescription of the instru particulars of set-off.

Nov. 6.

GREEN and Another *v.* GOSD

A plea that a promissory note was obtained by fraud, covin, and misrepresentation, pleaded by a surety in such note, was held not to be supported by proof that the note was given for money lent by the plaintiffs at 20 per cent. name of a joint stock company, fraudulently represented by the p been established for the purpose of lending money at 5 per cent, a shareholders, contributors, and borrowers, and to be governed by by such shareholders, contributors, and borrowers no such compa existed, and the two plaintiffs being the only lenders.

DEBT upon a promissory note for 20*l.* defendant, payable to the plaintiffs demand, with a count upon an account stat

Pleas: to the first count, first, *non fec* that the note was obtained from the defen plaintiffs and others in collusion with ther covin, and misrepresentation; to the se thirdly, *nunquam indebitatus.*

The replication joined issue on the fir

aversed that the note was obtained from by the plaintiffs and others in collusion y fraud, &c. *modo et formâ;* upon which ed.

al before *Tindal* C. J. at the sittings at er last *Michaelmas* term, the plaintiffs over a balance of 11*l.* 4*s.* upon the note in ich was the joint and several note of the l one *Dixon* and one *Cole*, given as a se- repayment by *Dixon*, who was a tenant ant, of 20*l.* advanced to him by the plain- hemselves "The Saint Pancras Equitable Loan Company;" and pretending to be a ished for the granting of loans under cer- tained in a printed book, a copy of which to each person borrowing money from the ciety.

f these rules was as follows: —

— The management of the society is vested nsisting of a treasurer and seven trustees, to arterly among the shareholders, with power ir number, three to form a quorum, who n the second *Friday* in every month, to atters and things relative to the company mitted by the secretary, who shall have the trustees together at two days' notice, ergency."

owed a variety of regulations respecting duties, and proceedings of shareholders, nd contributors.

— This society grants to respectable trades- ers in want of pecuniary assistance, loans or 30*l.*, at 5 per cent. interest, repayable stalments of 4*s.*, 8*s.*, or 12*s.* each, accord- m advanced; to be under the management

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of trustees chosen from amongst the share treasurer, secretary, and two stewards (the be chosen from the borrowers)."

Then followed rules for the regulation amongst which was a direction that each should take a copy of the rules, &c., for was to pay 6*d.*

Notwithstanding the announcement in the fi society consisted solely of the plaintiffs, *Green leigh*, without contributors, depositors, or sh It appeared that the money advanced to *Dix* 20*l.* but 16*l.* 4*s.*, upon which interest was about 20 per cent.; but there was no proc defendant or his co-surety were apprised viations from the rules. It was contended o of the defendant, that as a surety he might s frauds as an answer to the action, under the s The learned judge however was of opinio question raised by the second plea was not, w setting up of the pretended society was a whether the defendant had been induced by of the plaintiffs to become a party to the not for *Dixon;* and he left it to the jury to say w defendant became surety for *Dixon* under a tion that the whole 20*l.* would be advanc plaintiffs to *Dixon*, and that the interest char loan would not exceed the rate of 5 per ce num. The jury found a verdict for the plai the first issue, to the extent of 5*l.*, parcel of th manded, and as to the remainder of that iss defendant; upon the second issue for the plai upon the third issue for the defendant.

Jan. 14. *Bompas* Serjt. having in the following ter a rule *nisi* for a new trial,

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rjt. now shewed cause. The case was left a manner most favourable to the defendant. ıttempted to be set up at the trial was e defendant upon the pleadings, in which wers set up against the note are, first, ondly, fraud, covin and misrepresentation the note; *Connop* v. *Holmes.* (*a*) There in this case that the defendant was de- incorrect representations held out by the was immaterial to persons dealing with the eceiving their money, whether the society two persons or of a greater number. If a case to which the usury laws applied, ad been pleaded, the case might have ferent aspect; but usury cannot be given ıder a plea of fraud and covin. [*Maule* J. of an agent holding himself out as the r.]

rjt. in support of the rule. In *Connop* v. raud was not precisely alleged, and the ıted by the court as wholly unintelligible. *ompton* (*b*) it was held that if any material transaction between the creditor and the epresented to a surety, with the knowledge or, the misrepresentation being such, that ent of the surety would not have been en- f such misrepresentation had not been urity is void on the ground of fraud. Here, had not the benefit which the defendant o expect. The pretended society was got rpose of inducing persons to become sure- from which the contrivers of the scheme ve enormous profits without incurring any

. & *R.* 719.
5.

(*b*) 5 *New Cases*, 142., 6 *Scott*, 846.

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risk. It is to be presumed, that if the defe been aware of the fraudulent nature of the repr held out by the plaintiffs, he would not have to become a party to the transaction; at all ought to have had it in his power to determi under the real circumstances of the case, he to become a party to the note. If the pla been entitled to recover anything, the verdic have been for the full amount claimed; but is clearly a perverse verdict.

TINDAL C. J. If this appeared to be a pe dict, or if the direction to the jury was not point of law, the court ought to interfere.

It does not appear to me that this was ne perverse verdict. The question was, not arithmetical question as to the amount ad *Dixon* and the rate of interest charged, but w defendant was fully acquainted with the nat transaction in which he became surety. If entered into the engagement with his eyes engagement cannot be said to have been obta him by the fraud, covin or misrepresentati plaintiffs.

The second question is, whether there was point of law. It does not appear to me that a from the rules would amount to fraud within ing of the plea, unless such deviation affected ticular contract. To support an allegation of covin, it is not sufficient to set up some legal to the transaction as usury &c. It must that some concealment or other deception practised with respect to the particular transac

COLTMAN J. I am of the same opinion. had been six persons in the society instead of

uld have had six creditors instead of two; see in what manner he would be benefitted ge. (a)

pect to the other point, though I should red the defendant entitled to a verdict in the question was one for the jury. Their f the world would enable them to form an o the probability of the defendant's being circumstances under which the money was *Dixon.*

J. I am of the same opinion. If the ques-en, whether the verdict was justified by the hould have thought that the case ought to to another inquiry. But as the verdict is there can be no new trial, unless we can conclusion that this was a *perverse* ver-immaterial, for the purpose of the plea, alleged society consisted of twenty indivi-wo.

If the jury had been asked to say, whe-r opinion, the mode in which the society be constituted and governed formed any inducement to the defendant to join in the y would, no doubt, have negatived such a The sole object of the defendant was to oney for the accommodation of his tenant. irregular construction of the society is no e action under the second plea. The next hether the defendant was induced to become

(a) might be wil-ct a liability on erson borrowing ody acting under shareholders and might hesitate to commit himself to a private money-lender acting under a disguise, subject to no responsibility or control, and ready to proceed against the debtor upon the first default.

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a party to the note by any fraudulent repr held out by the plaintiffs. In *Stone* v. *Comp* was an express misrepresentation as to the te arrangement for the effecting of which the became surety to the bankers. The deed c recital that 800*l.*, a sum in which the princi stood indebted to the plaintiffs, had been paid in fact, that sum was deducted from the 2600 the defendant was to become surety; and t put themselves upon the court for their dec the effect of a misrepresentation with respect material fact. Here, upon a different state of jury have come to a different conclusion.

Rule d

SWEET *v.* LEE, Esq.

Where an agreement in writing respecting a work to be prepared by one party and to be published by the other, is expressed in short and incomplete terms, parol evidence is admissible to explain that which is *per se* unintelligible, such expl being inconsistent with the written terms.

ASSUMPSIT. The first count of the d stated, that the defendant before, and a of the retainer and promise thereinafter next r was the author and proprietor of the co and in a certain book, intituled "A Dic the practice in civil actions in the courts Bench and Common Pleas, with practical and forms arranged under each title;" tha fore and at the time of the making of the sai and promise, the plaintiff was and from thenc

An agreement between an author and a bookseller, by which th be paid an annuity for life, without any apparent consideration, and signature, other than the initials of the parties, is void under the statu

By submitting to a nonsuit not spontaneously but in deference t expressed by the judge that the action is not maintainable, a plaintif cluded from moving to set that nonsuit aside.

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ıd still was a law-bookseller and publisher
:s, and the trade and business of a law-
nd publisher of law books, had for and
ıat time, used, exercised, and carried on,
l use, exercise, and carry on; that there-
e 1st of *March* 1837, in consideration that
at the special instance and request of the
ıad retained and employed the defendant
e, and prepare for print and publication a
of the said book for the plaintiff; and to
persons employed by the plaintiff to print
ion, with sufficient manuscript copy for the
reof, and to examine the print thereof after
ıs been sent to him in printed sheets, and
se sheets corresponded with the said copy
him for printing as aforesaid, and to correct
ıen they did not do so, and otherwise revise
e the said sheets that the same might be
and carried through the press] by the said
employed by the plaintiff to print the said
reward to the defendant in that behalf
the plaintiff, the defendant promised the
use due care, skill, and diligence in and
id employment, and in and about the matters
o to be done by him as aforesaid; that the
n employed one *Walter M'Dowall* to print
ion, and continued so to employ him for a
of time, to wit, until, at, and after the de-
efault and breach of his said promise as
mentioned; whereof the defendant during all
oresaid had notice; and the defendant then
editing, revising, and preparing for publica-
edition of the said book for the plaintiff, and
performing other the matters and things so
ıdant to be done as aforesaid: and although
M. was at all times ready and willing to

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print the same, and the manuscript supplied
the defendant for the printing thereof, and
the defendant printed sheets thereof, and did
defendant in a reasonable time next after the
supplied him with manuscript copy of the
edition for printing, printed sheets thereof, an
the plaintiff had at all times been ready and
perform and fulfil all things on his part and be
and by virtue of the said bargain and contract
formed and fulfilled, and although a reasonab
the defendant to edit, revise, and prepare for
publication the said new edition, and otherw
perform the said matters and things so by
done and performed as aforesaid, had long
commencement of the action elapsed; yet the
had not before the commencement of the act
revised, or prepared for publication a new edi
said book for the plaintiff; and although a
time for the defendant to supply the said
manuscript copy for the printing of the said
tion of the said book for the plaintiff had,
the commencement of the suit, elapsed, and al
plaintiff and the said *W. M.* were at all tim
that time ready and willing to accept and re
manuscript copy; whereof the defendant,
that time, had notice; yet the defendant di
would, use due diligence in and about the sup
said *W. M.* with sufficient manuscript cop
printing of the said new edition for the pla
did not nor would within that time supply
W. M. with sufficient manuscript copy for hi
the said new edition for the plaintiff; and tha
the defendant did afterwards, to wit, on the
year aforesaid, and on other days and times
supply the said *W. M.* with a small quantity
script copy for the printing of the said new

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for the plaintiff, and the said *W. M.* did
wit, on the day and year aforesaid, and
other days and times print the same, and
sheets thereof to the defendant; and al-
onable time for the defendant to examine
he said sheets, and see that the same cor-
th the said copy, and correct the same
e did not do so, and otherwise revise and
id sheets, that the same might be printed
hrough the press by the said *W. M.* had
he defendant did not use due diligence in
ut for and during the said reasonable
rwards, wholly omitted and neglected to
rint of the said sheets, and see that the
nded with the said sheets, or see that the
nded with the said copy, or correct the
e same did not so, or otherwise revise
he said sheets, that the same might be
carried through the press by the said *W.*
ly omitted and neglected so to do; by
h premises the plaintiff had lost and been
ll the profits, benefits, and advantages
ht, and otherwise would have derived and
the publication of the said new edition,
ndant performed his said promise; and
to and incurred divers costs and expenses
200*l.* in and about the printing of the
d other parts of the said new edition of
, and in and about the preparing for
ublishing the residue thereof, and in and
employment of the said *W. M.*, and also
nd expenses, amounting to 100*l.*, in and
rchasing and procuring paper for the
nd other parts of the said new edition
ok so printed as aforesaid, and of other
residue of the said new edition, and also

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divers costs and charges amounting to 5*l.*, i
the advertising the publication of the said
and also divers costs and charges amountin
and about the warehousing of the said parts
new edition so printed as aforesaid; and als
of the premises, the plaintiff had lost, and be
of divers moneys, amounting to 700*l.*, which
the defendant for and on account of such
aforesaid, and also the interest, profits, and
which he might, and otherwise would, ha
from those moneys; and the plaintiff had be
by means of the premises otherwise much da

Second count, for not indemnifying t
against a bill of exchange for 105*l.* accepted
the defendant's accommodation. Third coun
had and received. Fourth count, for inte
count, upon an account stated.

Pleas: first, to the whole declaration, no

Secondly, to the first count, that the de
ceeding with the work was occasioned by
Verification.

Thirdly, to the first count, that a reasona
the defendant to edit, revise, and prepare f
publication, the said new edition in the
mentioned, and otherwise do and perfor
matters and things so by the defendant to b
performed as in that count was mentione
elapsed before the commencement of this
cluding to the country.

Fourthly, as to the not using due dilig
about supplying the said *W. M.* with suffi
script copy for his printing of the said new
the plaintiff, and not having within a reas
supplied the said *W. M.* with sufficient manu
for his printing the said new edition of the sa
the plaintiff, as in the said first count is men

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did use due diligence in and about the
nd did within such reasonable time as in
ory part of that plea was mentioned, sup-
W. M. with sufficient manuscript copy for
he said new edition as in the said first count
r the plaintiff; concluding to the country.
to not using due diligence in the behalf in
count mentioned, and omitting and neglect-
luring the reasonable time in the said first
behalf mentioned, to examine the print of
ts in that count also mentioned, as sent by
M. to the defendant, and see that the same
with the said sheets, or see that the same
with the said copy, and correct the same
ot do so, and otherwise revise and prepare
ts, that the same might be printed and
gh the press by the said *W. M.* as in the
nt was mentioned, — that the defendant did
ence in that behalf, and did not neglect
et formâ; concluding to the country.
to so much of the second count as related
r damage which accrued to the plaintiff, by
having been forced and obliged, as in
entioned, to pay the said sum of money
the bill of exchange mentioned in that
much of such interest in that count men-
uld be due and payable on a calculation
and upon the 30th of *September* 1839, for
of the plaintiff's acceptance of the said
ge,—that before the making of the promise
mentioned, to wit, on the 27th of *February*
ertain agreement in writing, then made be-
laintiff and the defendant respectively, the
and in consideration of the said retainer and
of the defendant by the plaintiff as in the
entioned, and also of the said promise of

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the defendant also in the said first count
amongst other things promised the defendant
certain large sums of money, to wit, 80*l.* per
five years, commencing at *Michaelmas* 1828
per annum during the remainder of the life
fendant, if he survived the five years, by equa
payments in each and every year during the
said, the first quarterly payment thereof to
Michaelmas 1828; that the said agreement
made as aforesaid, afterwards and by virtue
wit, at *Michaelmas* 1828, and thenceforth
piration of every quarter of a year which e
tween the day and year last aforesaid and
of *September* 1836 the plaintiff truly paid
fendant the said sum of money by the said
stipulated; that afterwards, and after the ma
said agreement, and after the said bill of
became due and payable, and before the said
menced his said action against the plaintiff
count mentioned, and before the plaintiff h
the said *C. S.* the said sums of money in
count mentioned or any part thereof, to wit, o
of *September* 1839, a large sum of money, to
for twelve quarterly payments of the annu
60*l.* in the said agreement mentioned, becam
due and payable from the plaintiff to the
under and by virtue of the said agreement,
day and year last aforesaid, was, and thenc
been, and still was, wholly in arrear and unpai
by the plaintiff to the defendant; and which su
so due and payable, and so in arrear and
aforesaid, exceeded and exceeds the said sum
specified in the said bill of exchange and su
thereon as in the introductory part of the
tioned; that the said sum of 180*l.* being and
so due and payable, and in arrear and unpaid

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he defendant as aforesaid, he the defendant
ne when the said *C. S.* commenced his said
t the plaintiff, and before the plaintiff had
nd obliged to pay or had paid any sum
atsoever to the said *C. S.* as in the said
mentioned, on the occasion in that plea
d, and after the time when the said bill of
came due and payable according to the
ect thereof, and of the plaintiff's acceptance
it, on the 30th of *September* 1839, he the
plied to the plaintiff and then requested the
ke up the said bill of exchange, and to pay
of money therein specified, together with
thereon as was in the introductory part of
tioned, out of the said sum of 180*l.* so due
nd in arrear and unpaid from the plaintiff
ant as aforesaid; and that he the plaintiff
ght and ought when he was so requested
to have taken up the said bill of exchange,
paid the sum of money therein specified,
such interest thereon as last aforesaid, to
out of the said sum of 180*l.* so due and
in arrear and unpaid, from the plaintiff to
as aforesaid. And so the defendant did
and indemnify the plaintiff from any loss
hich accrued to the plaintiff, by the plain-
een forced and obliged to pay the said sum
cified in the bill of exchange, and so much
st in the second said count mentioned, as
e and payable on a calculation thereof up
the said 30th of *September* 1839, for and by
acceptance of the said bill of exchange.

as to all the residue of the said second
f the plaintiff had been damnified in re-
esidue of that count, for or by reason of his

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acceptance of the said bill of exchange, he h
damnified of his own wrong, and by and t
own means and default. Verification.

Replication; issue on the first, third, fourt
pleas; *de injuriâ*, to the second and sixth pl
seventh, that the plaintiff was not damnified
wrong, or by or through his own means
modo et formâ. Issue thereon.

At the trial before *Coltman* J. at the sittin
minster, after last *Hilary* term, the plaintiff, t
contract stated in the first count, produced
ing memorandum in the handwriting of the
written upon a blank leaf of one of the vol
work.

" *Dict. of Practice.*

" 80*l.* per annum for five years, commen
1828,—

60*l.* per annum for the remainder of Mr
if he survives the five years; payable, in
quarterly, the first payment *Michaelmas* 182

" 15th *February* 1827.

" Mr. *Lee* to separate the practices of
C. P."

The plaintiff's counsel then asked the
whom this memorandum was produced, an
present when the agreement was made and
randum written, to explain the terms used by
For the defendant it was submitted, that par
in explanation of a written instrument, was in
The learned judge ruled that, the terms of
randum being incomplete and unintelligible
was competent to the plaintiff to shew by
dence in what sense those terms had been
evidence not being inconsistent with such ter

tions in the sixth plea were considered
l judge to be proved by the evidence pro-
plaintiff in support of the first count.
efendant it was objected, that the agree-
to be performed within the year, and
re to have shewn, *ex facie*, a sufficient
(*a*), and to have been signed by the party
harged therewith, in compliance with the
of the statute of frauds. (*b*) The learned
lering this objection to be well founded,
opinion that the plaintiff must be called.
aintiff it was insisted, that he was entitled
no sufficient answer having been given to
unt, or to the count for money had and
r which the plaintiff claimed to recover
alments of the annuity paid to the de-
onsideration having failed by the renun-
agreement on the part of the defendant.
judge was however of opinion, that the
the sixth plea being proved, were a suf-
to the second count, and that the pay-
been made with knowledge of the cir-
ne money could not be recovered back.
he plaintiff submitted to be nonsuited.

rjt., in the following term, moved for a
he defendant could not avail himself of
to the special contract, so as to entitle
verdict upon non assumpsit, and at the

n v. *Warlters*, 8 *A. & E.* 846., 1 *P. & D.* 138.; nders v. *Wake-* *Haigh* v. *Brooks*, 10 *A. & E.* 595.; *Jenkins* 309. 334., 2 *P. & D.* 477.
B. & B. 14.; (*b*) 29 *Car.* 2. *c.* 3. As to
ely, *ib.* 211.; this branch of the section see
ns, 3 *N. & M.* *Boydell* v. *Drummond*, 11 *East*,
v. *Cheek*, *ib.* 142., 2 *Campb.* 157.; *Brace-*
. *Piggott*, 4 *N.* *girdle* v. *Heald*, 1 *B. & Ald.*
ikes v. *Todd*, 722.; *antè*, Vol. I. 366. (*a*).

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same time insist upon that contract, as an
binding engagement under an issue expr
upon the existence of that contract. (a) Th

(a) The words of the statute are "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by *the party to be charged therewith.*" The plain meaning of the latter words would seem to be "the party liable to be called upon to perform such agreement." In the ordinary case of a promise to pay the debt of a third person, the contract is unilateral, though there are two parties to the contract there is only one *contracting party*. Thus, where *A.* guarantees to *B.* the payment to *B.*, of the price of goods to be sold by the latter to *C.*, *B.* contracts no obligation to sell goods to *C.*, though, if he does so, the liability of *A.* attaches, and his contingent engagement becomes absolute, the resulting or springing consideration being sufficient to support *A.*'s contingent promise. *Minett, ex parte,* 14 *Ves.* 189.; *Gardom, ex parte,* 15 *Ves.* 286.; *Warrington* v. *Furbor,* 6 *Esp. N. P. C.* 89.; *Stapp* v. *Lill,* 1 *Campb.* 242.; *S. C. per nomen Stadt* v. *Lill,* 9 *East,* 348. In such cases there is no difficulty; but where the contract is not unilateral, but synallagmatic, where each party to the agreement engages to do some act, each would appear to be "the party to be charged therewith" within the meaning of this statute; as otherwise, where the agreement was signed by one of the contracting parties, only one party t
matic agreemen
bound and the ot
Ferrer v. *Oven,* 7
1 *Mann. & Ryl.* 2
Bolland, 4 *Russ.*
v. *George,* 1 *Mad*
v. *Hopkins,* 1 *M*
4 *Mo. & Sc.* 615.
105. (*b*), 491. (*a*
624. Vol. II. 67.
Slade, 7 *Ves.* 2(
Lord *Eldon* C. i
have said, "This
signed by the de
only; but that ma
the statute *a party*
the words of the
not "*a* party to
but "*the* party to
The same view c
was taken by the
in *Egerton* v. *Mat*
307., and by this
v. *Bennet,* 3 *Tau*
see *Martin* v. *M*
& *W.* 426.; *Palm*
Russ. & M. 391.
rican edition of *V*
gives the following
"*Ballard* v. *Wa*
Ca. 60. See al
Bailey, 14 *John*
where the *English*
viewed by Chanc
The courts ap
considered that it
compliance with t
frauds, to produce
signed by the d
though not signed
tiff, treating the
charged therewith
lent to the words
be charged in such
Under this cons

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upon a consideration which failed. The
s therefore entitled to a verdict upon so
e first issue as related to the second and third
upon the issue taken upon the sixth plea.
having been granted upon both points,

l Serjt. (with whom was *Tyndale*) now
se. The nonsuit was a voluntary act of the
ounsel; he is therefore not entitled to come
to have the nonsuit set aside. It may be
evidence might have been given of pay-
by the plaintiff on account of the annuity;
rned judge was of opinion, that as these
ad been made with the full knowledge of
ey could not be recovered back. No evi-
given or offered in support of the second
e sixth plea, therefore, became immaterial.
ntiff had pressed for a verdict upon the
t, however, the defendant would have been
it him. [*Tindal* C. J. Counsel might sup-
hey would be at liberty to move on the

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stion, there would no inconsistency he existence of a reement under a ssumpsit, and set- me agreement as some other part ff's demand. The e agreement men- e declaration with n the plea would pon the record; , the allegation of ined in one plea et up as an answer f an allegation of t contained in an- *Fischer* v. *Aidé*, 486., 6 *Dowl. P.* C. 594.; *Twemlow* v. *Askey*, 3 *M. & W.* 495., 6 *Dowl. P.* C. 597.; *Smith* v. *Martin*, 9 *M. & W.* 304. The plaintiff might, under the plea of non assumpsit, fail in establishing the agreement stated in the declaration, from being unable to shew the defendant's signature to the agreement, whilst the defendant might succeed upon an issue taken upon a traverse of the *same* agreement set up in the plea, by shewing that the plaintiff had signed the agreement, or that he had subsequently recognised it in some letter or other memorandum or note in writing signed by him.

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whole record.] This motion was principally upon the ruling of the learned judge, as to for money had and received. On the case sented at nisi prius, there was no right to rec the payments mentioned in the memorandu 15th of *February* 1827. Those payments co that class of cases which proceed upon the *ignorantia legis non excusat.* In *Bilbie* v. it was held, that money paid with full know the means of knowledge (*b*) of all the circu cannot be recovered back on the ground of ment being made in ignorance of the law *Taylor* v. *Hare.* (*c*) [*Maule* J. That was ignorance of fact. The payments were m patentee in ignorance of the fact of the inven in public use before the patent was obtaine decision proceeded upon the ground that th payment had been made under a misapprehen the fact which rendered the patent invalid, had had the use of the invention which had f consideration of the payment. So here, the p enjoyed the benefit of keeping other work market. The cases in which payments mad void annuity have been recovered back after t has been set aside, furnish no analogy, be fourth section of the statute of frauds does the agreement void where the terms of the not complied with, but merely direct that shall be brought upon such agreement; wh annuity acts declare that when the provision statutes are contravened, the annuity shall void. In this case there had been no repudia contract before the trial; no objection had b

(*a*) 2 *East*, 469.

(*b*) As to the possession of the *means* of knowledge, see *Kelly* v. *Solari*, 9 M *Bell* v. *Gardiner*, p

(*c*) 1 *New Rep.*

greement was void in law. The real nature ansaction is presented in the first count. annuity is set aside by the act of the court, ntor, upon the discovery of a defect in the refuses to execute fresh assurances, the price nuity may be recovered as money had and y the grantor to the use of the grantee; *Wed-am.* (*a*) So, where the grantor has intimated tee that there are defects in the memorial, and pon entered into a treaty for a compromise on l of the annuity being void; *Waters* v. *Man-*But it is essential, even in the case of a void nat some act should have been done in repu-avoidance of the annuity, before an action can t to recover back the purchase-money; *Beed rd.* (*c*) There must be a complete rescinding tract to support an action for money had and Here, the parties cannot be placed in the tion as they were in at the time the agreement (*d*)

ly question which remains is on the sixth plaintiff could not, when the judge proposed him, have insisted upon taking a verdict upon reserving to himself the power of coming to to set aside a verdict upon another issue. J. Where the main point is decided by the nst the plaintiff, it would be very inconvenient him to go on to try other matters.]

Serjt. (with whom was *Peacock*), in support . The agreement does not state to whom or the 80*l.* or the 60*l.* is to be paid. It may the money was to be paid when the defend-

p. N. P. C. 309.
unt. 56.
& J. 288.

(*d*) *Vide Hunt* v. *Silk*, 5 *East*, 449., 2 *J. P. Smith*, 15.; 4 *Mann. & Ryl.* 421. (*a*).

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ant should be called upon to publish the work. not therefore appear that the performance o tract might not take place within a year. The dictionary might be published within but the annuity could not be paid within t In *Donellan* v. *Read* (*a*), an agreement by landlord was to lay out 50*l.* in improvem tenant undertaking to pay an increased rent term of which several years were unexpired, not to be an agreement which could not be against the tenant by reason of its being an not to be performed within a year, inasmuch was fixed for the making of the improvemer might therefore possibly be completed within

The question is, whether, according to the the agreement, the contract may by possibilit pleted within the year; *Boydell* v. *Drummond.* (*dal* C. J. You may shew by extrinsic evi situation of the parties at the time the c made (*c*), but you cannot alter the terms of th by such evidence. You could not turn the mentioned in this agreement into four years.] which it was proposed on the part of the p add at the trial, were those stated in the fi [*Tindal* C. J. The first count is within the st cause the term agreement includes the consid well as the promise. (*d*) *Maule* J. Cases of

(*a*) 3 *B.* & *Ad.* 899.

(*b*) 11 *East*, 142., *S. C.* 2 *Campb.* 157.

(*c*) See *Doe dem. Chevalier* v. *Huthwaite*, 3 *B.* & *Ald.* 632.; *Denn dem. Bulkeley* v. *Wilford*, 8 *Dowl.* & *Ryl.* 549., *Ry.* & *M.* 88., 2 *C.* & *P.* 173.

(*d*) This has been frequently held with respect to *special promises* to answer for the debts, &c. of a third pe until the present c not appear to have b with respect to agre to be performed space of one year. the cases upon speci to answer for debts upon the meaning o "agreement," which the close of the four

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greement is signed by one only of the con-
ties. (*a*)] Suppose the case a contract to
e in two years for 2000*l.*, and 1000*l.* is paid,
ay be recovered back if the house is not
gh the contract may be void for want of an
n writing, complying with the requisites of
f frauds. Though annuities not granted in
with the provisions of the annuity acts are
be void, they are so only at the election of
The repudiation of the grant of the an-
part of the grantor is not effectually made
t, but is made in court when the point is
. Actions brought to recover back pre-
nsurance appear to stand upon the same
Maule J. In those cases the plaintiff recovers
ment made under mistake of *fact*.] No
been given to the right of the plaintiff to re-
dict upon the sixth plea. [*Maule* J.—to
rjt.—*De injuriâ* in a replication is equivalent
npsit in a plea, and the agreement set up in
ea is void by the statute of frauds. If the
en heard at the trial, the verdict would have
e defendant on the first, third, fourth, and
and for the plaintiff upon the several issues
the second count.]

C. J. We think the plaintiff is not entitled
ne contract, or to recover back the payments

---

special promises
r debts, &c. as
ments not to be
hin the year.
within the second
e fourth section
lecided upon the
iven to the word
as *Wain* v. *Warl-*
ters, &c., will be authorities upon cases falling within the fifth clause of that section; but cases falling within the second clause, decided, as *Saunders* v. *Wakefield*, upon the effect of the term "special promise," will not. *Vide* 6 *Nev. & M.* 680.

(*a*) *Vide antè*, 464. *n.*

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made under it, but that he is entitled to a ne to the issues taken upon the second count.

It was then agreed that a verdict should b for the plaintiff upon so much of the first iss lated to the second count, and upon the issue the replication to the sixth plea, and for the upon the residue of the issues.

Rule ac

Nov. 23.

FILBEY *v.* LAWFORD.

A. being indebted to *B.*, accepts *B.*'s drafts on him for the amount. Before the draft becomes due it is agreed that it shall be renewed, *B.* taking up the old draft, and *A.* drawing a new bill. The new bill is drawn by *A.* and negotiated by *B.* *B.* omits to take up the old bill, and *A.* is sued upon it by the holder. Pending this suit a fiat issues against *B.*, and afterwards *A.* bills. Held, that upon the arrangement for a renewal of the first entered into, *A.* became "a person liable for the debt of *B.*" within ing of the 6 *G.* 4. *c.* 16. *s.* 52., and that *A.*'s demand against *B.* for no ing his engagement to take up the first bill, was provable under the *B.*, and was, therefore, barred by his certificate.

ASSUMPSIT. The first count of the d stated that the plaintiff, before and at th the making of the promise thereinafter next m had accepted and delivered to the defendant tw exchange, one of the said bills being a bill of bearing date the 23d of *July* 1839, drawn b fendant on the plaintiff, whereby the defendan the plaintiff, four months after the date thereo to the order of the defendant 73*l.*, and t being a bill of exchange bearing date th *August* 1839, drawn by the defendant on the whereby the defendant required the plaint months after the date thereof, to pay to the or defendant 73*l.*: that the defendant had indo negotiated these bills; that on the 2d of *Novem* in consideration that the plaintiff would accept bills of exchange, to wit, a certain bill of

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te the 12th of *October* 1839, drawn by the
on the plaintiff, whereby the defendant re-
plaintiff, four months after the date thereof,
e order of the defendant 73*l.*, and a certain
exchange bearing date the 26th of *October*
a by the defendant on the plaintiff, whereby
nt required the plaintiff, four months after
reof, to pay to the order of the defendant
and would deliver the last-mentioned bills
to the defendant in order that the defendant
iate the same for his own use and benefit,
dant promised the plaintiff to indemnify and
mless from and against the payment of the bills
ondly above mentioned, and from and against
costs, charges, damages, or expenses which
ight happen or arise by reason of the non-
the same by the defendant when they re-
ecame due. Averment: that the plaintiff,
the said promise of the defendant, did,
to wit, on the said 2d of *November* 1839,
ills of exchange thirdly and fourthly above-
and deliver the same so accepted to the de-
the purpose aforesaid. Breach: that the
lid not nor would indemnify the plaintiff or
rmless from and against the payment of the
d secondly above mentioned when the same
; but wholly neglected so to do, and thereby
sons, to wit Messrs. *Curling* and Co., who
olders of the bills of exchange first and
ove mentioned at the time of the same re-
ecoming due (the defendant having indorsed
R. B. and *C. N.*, and the said *R. B.* and
g indorsed the same to the said Messrs.
Co.), afterwards, to wit, on the 7th of *De-*
, commenced an action on promises at their
Majesty's court before the justices of the

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Bench at *Westminster* against the now plain
acceptor of the bills of exchange first and seco
mentioned, for the recovery of the amount the
the damages which they had sustained by rea
non-payment thereof respectively; and such p
were thereupon had in the said action that,
to wit, on the 7th of *January* 1840, it was
in and by the said court that the said Mes
and Co. should recover against the now plaint
for their damages which they had sustained b
payment of the bills first and secondly above
when they respectively became due as for
and charges by them about their suit in that
pended; and the now plaintiff was afterwards
the commencement of this suit, to wit, on t
year last aforesaid, and on divers other days
afterwards called upon and forced and obli
and did pay, to the said Messrs. *Curling* and
on account of the said damages, costs, a
divers sums of money, amounting together t
being the said sum so recovered by the sai
as aforesaid; and by means of the premises
sustained and incurred divers costs and
amounting, to wit, to 20*l.* in and about the
ing to settle and put an end to the said act
paying such sums as aforesaid, and in payin
and charges of the said Messrs. *Curling* and
incurred and expended in that action; and b
the said several premises the plaintiff has los
deprived of the use and benefit of the said s
him paid &c.

Second count, for money paid; third cou
account stated.

The defendant pleaded the general statut
bankruptcy (*a*); on which issue was joined.

(*a*) *Vide* 5 *G.* 2. *c.* 30. *s.* 7.; 6 *G.* 4. *c.* 16.

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trial, before *Tindal* C. J., at the sittings at after last *Hilary* term, the following facts ap- The plaintiff was a wine merchant at *Nor-* defendant carried on the same business in The plaintiff being indebted to the defendant e latter, on the 23d of *July* and on the 9th of 9, drew two bills of exchange for 73*l.* each laintiff, payable to the order of the defendant d four months' date; which bills the plaintiff In *October* 1839, the plaintiff informed the hat he should not be prepared to meet his , and requested the defendant to take them draw two other bills in renewal thereof. The ssented, and drew two other bills upon the 73*l.* and 73*l.* 6*s.* 6*d.* dated respectively, the e 26th of *October* 1839, payable to the de- rder at three months' date, which the plain- ed. The defendant being in embarrassed es, did not provide for the first two bills, 7th of *December* 1839, *Curling* and Co., as f those bills, brought an action in this court *bey*, the now plaintiff, as the drawer thereof. h of *December* *Filbey* wrote to *Lawford*, and received an unsatisfactory answer. On the *ecember* a fiat in bankruptcy was awarded *wford*, under which he afterwards obtained ate. *Lawford* took out a summons to stay lings in *Curling* and Co.'s action, and on the *ecember* an order was drawn up, by consent, the proceedings in that action, *Filbey* under- ay to *Curling* and Co. the debt and costs by . The bills of the second set were taken up y *Filbey* as acceptor.

ontended on the part of the defendant, that d was barred by the certificate, being provable fiat. The learned judge being of this opi-

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nion, directed a verdict to be entered for the
reserving leave to the plaintiff to move to ente
for him as to so much of the issue as rela
first count, if the court should be of opinio
action was not barred by the certificate.

Channell Serjt., in *Easter* term, moved to e
dict for the plaintiff for 166*l.* 6*s.* 6*d.*, being t
recovered by Messrs. *Curling* and Co. for
costs, in the action brought by them against th
or for the sum of 146*l.*, if the court should be
that the plaintiff was not entitled to charge t
ant with the costs of that action. [*Tindal*
question is, whether the debt was provable
defendant's fiat. It struck me that this
actually due at the time of the fiat, and that
abstaining from paying the amount until aft
had been awarded ought not to prejudice t
ant.] *Yallop* v. *Ebers* (*a*) appears to be direct
Upon looking only at the marginal note of
the difficulty would not be removed; but the
establishes two points: 1st. that this was no
gent debt provable by the plaintiff as a su
2dly, that it was immaterial that the debt wa
before the fiat. A rule nisi having been gra

Wilde and *Talfourd* Serjts. now shewed ca
case depends upon the construction of the 6
s. 52., which enacts that "any person who, a
ing of the commission, shall be surety or lia
debt of the bankrupt, if he shall have paid t
any part thereof in discharge of the whole deb
he may have paid the same after the commiss
if the creditor shall have proved his debt
commission, shall be entitled to stand in th

(*a*) 1 *B. & Adol.* 700.

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as to the dividend and all other rights
d commission which such creditor possessed
entitled to in respect to such proof, or if
shall not have proved under the commis-
rety or person liable shall be entitled to
nand in respect of such payment as a debt
mmission, not disturbing the former divi-
nay receive dividends with the other cre-
gh he may have become surety or liable
after an act of bankruptcy committed by
pt, provided that such person had not,
me surety or so liable as aforesaid, notice
bankruptcy by such bankrupt committed."
or liable for any debt of the bankrupt"
l. It would be improper to confine the
he origin of the transaction; the position
at the time the fiat was awarded is the
s principally to be considered. The first
n which this action is brought, were ori-
ted by the plaintiff on account of a debt
im to the defendant. At that time there-
tiff contracted a liability to pay these bills
f his own debt, and not as a surety for the
as a party liable for the debt of the de-
t before the time for the payment arrived,
tered into an agreement, founded upon a
ation, by which their position was entirely
he bringing of this action shews that the
become liable for a debt of the bankrupt,
ng founded upon a payment alleged to have
discharge of such liability.

ases a party is treated as a surety, or a
for a debt of the bankrupt, for the pur-
act, who might not be considered as a
lly; *Wood* v. *Dodgson*. (*a*) A party may

(*a*) 2 *M. & S.* 195., 2 *Rose*, 47.

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be liable as principal as against creditors, between himself and another debtor, he m surety, and may compel the creditor to p the estate of his co-debtor for his benefi pays the debt. The point was discussed v large in *Yonge, ex parte.* (*a*) A partner against a partner's estate after payment debt. In this case the effect of the agre which the plaintiff has declared, is, to m ceptor a surety for the drawer. A surety who may be called upon to pay a debt made by the principal debtor. Suppose t had paid the bill by discounting the bill *Fourdrinier* (*b*), *Van Sandau* v. *Corsbie* (*c*) *parte.* (*d*) The case of *Yallop* v. *Ebers* for the plaintiff; but that case may be from the present. There the court held t fendant *Ebers* was not discharged, on the he was not originally liable to the creditor case proceeded upon that distinction (*e*), w perly taken or not. The law as laid down

(*a*) 3 *V. & B.* 31., 2 *Rose,* 40.

(*b*) 6 *Bingh.* 306., 3 *M. & P.* 745.

(*c*) 2 *B. Moore,* 602., 3 *B. & Ald.* 13., 1 *Chitt. R.* 16.

(*d*) 1 *Rose,* 4.

(*e*) That distinction exists between the two cases; but the *ground* of the decision was, that an accommodation acceptor was not a surety, and that *Laxton* v. *Peat,* 2 *Campb.* 185., where the contrary was held, had been overruled, *Laxton* v. *Peat* being the case between an accommodation acceptor and the holder, *Yallop* v. *Ebers* and the principal case being cases between the parties accommodating and the party accomm real difference bet may, perhaps, be circumstance tha cipal case both sid whereas in *Yallop* court, supporting the chief justice refused to grant and even the slight which the case rec ference to the f fifty-sixth rather fifty-second secti tute. If *Yallop* been fully discuss would, probably, h the same result, would, perhaps, ha case upon a differ

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been now cited for the defendant, is not the principle upon which the decision in *rs* purported to proceed.

erjt., on the the same side. In *Bassett* v. it was held that an accommodation ac- hin the 6 *G.* 4. *c.* 16. *s.* 52., a person liable of the party accommodated. *Haigh* v. as a stronger case than the present. There lebted to *B.*, *C.* at *B.*'s request, drew a payable to *C.*'s order, which *A.* accepted. the bill to *B.*, who negotiated it and be- ot, and obtained his certificate, having paid arrested *B.* The court ordered the bail- given up to be cancelled, on the ground was provable. Lord *Abinger* C. B. said, between the parties, the plaintiff was the d the plaintiff who lent him his name, a n."

Serjt. (with whom was *Bramwell*) *contrà*. *Ebers*, as here, the liability was before the the payment after. The plaintiff was ori- as acceptor. *Yallop* v. *Ebers* is an au- ly applicable to this case. There, it was as *Yallop* was not originally so he did a surety for *Ebers*. *Ebers* was originally the transaction; and here it is clear that ot originally a surety for *Lawford*. But it *Filbey*, though not originally a surety, ecame so. [*Maule* J. Does Lord *Tenter- p* v. *Ebers*, mean any thing more than this, cannot, by an arrangement between them- the rights of third persons?]

. 653., 2 *Mo.* & (*b*) 3 *M.* & *W.* 598.

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It does not follow that they may not position *inter se*. *Littledale* J. says in tha debt can be said to have subsisted betwee and the defendant before the certificate, an ment could not convert the plaintiff, who of the bill, from a principal into a suret case of partners each is jointly liable. One be called upon to pay more than his sha authorities cited for the defendant are ei partnership, or cases where the party w a surety. *Wood* v. *Dodgson*, *Yonge*, *ex pa lalo* v. *Fourdrinier*, were, all, cases of partne *dal* C. J. What difference can it make whet was originally a surety or becomes so *Van Sandau* v. *Corsbie*, and *Lloyd*, *ex par* where the plaintiff was originally a surety If the plaintiff stood in the situation of a does it signify when he became so? *Erskin* the defendant had paid the plaintiff befo ruptcy, could his assignees have recover amount from the plaintiff, who would be that the bankrupt was the party persona the time the payment was made?] This wa of the bankrupt. It was, at the most, a li demnify, upon which he might have be damages.

TINDAL C. J. In this action the plaintiff upon a promise made by the defendant t him against the payment of two bills of exch answer set up by the defendant is his ban certificate, as bringing the case within the fi tion of the 6 *G.* 4. *c.* 16. (*a*) What we ha is, whether, at the time of the bankruptcy,

(*a*) *Antè*, 470, 471.

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r a person liable for a *debt* of the bankrupt. *parte*, Lord *Eldon* C. treats the term "per- s one of more extensive signification than Also, in *Yonge, ex parte*. Then was it a m the bankrupt? The bankrupt, the de- a debtor to the holder of the bills, and the me subsequently liable for the defendant. iishes this case from *Yallop* v. *Ebers*, where though a surety, or a person liable, was not debt *of the defendant*. *Bassett* v. *Dodgin* e to be directly in point. I am therefore hat the rule for entering a verdict for the be discharged.

J. It seems to be conceded that where a ed for the accommodation of the drawer, if paid by the acceptor, may be proved by against the estate of the drawer. But a sought to be drawn on the ground that was not originally an accommodation ac- ording to the statute, however, you are to state of things as it existed at the time of f the commission, — now, of the awarding I see no reason to doubt the correctness ion in *Yallop* v. *Ebers*. It was there held e was not within the fifty-second section, defendant was not indebted to the plaintiff f the bankruptcy.

J. I am of the same opinion. When the arded against the defendant, there was a ling upon which both the plaintiff and the ere liable. In the ordinary case of an ion bill, the drawer, or other party ac- , is, as between themselves, the party pri- e, and the party who lends his acceptance r the party accommodated. So here, al-

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though the plaintiff was not originally an acc
acceptor, his position was changed by th
agreement. In *Yonge ex parte* (*a*), Lord
"If it is necessary to answer the moral j
case, the late act of parliament (*b*) would g
able aid. If that act be understood as a
to sureties strictly, it is impossible to repre
fields as sureties: but many cases fall with
of the other words in that act 'liable to:'
I know that act was intended to compr
drawer of a bill of exchange, for instance, i
a surety for the acceptor. In general
ceptor is primarily liable upon the bill; an
may be in the nature of a surety: but if th
action is, that as between them the drawer
liable, after what has passed at law, and
ference to the acceptor having or not hav
state from a perfect recollection (*c*), that w
passed, it was in contemplation, where jus
it, that the acceptor should be construed a
for the drawer: but further, the circumst
are to be looked at; and, if a person has b
under this section of the act he is to have

MAULE J. I am of opinion that this cas
the fifty-second section of the act, and t
tinguishable from *Yallop* v. *Ebers*. Unde
every person who at the issuing of the co

(*a*) 3 *Ves. & B.* 39. See also the report of this judgment in 2 *Rose*, 45.

(*b*) 49 *G.* 3. *c.* 121. *s.* 8., the provisions of which correspond with those of the 6 *G.* 4. *c.* 16. *s.* 52.

(*c*) This seems to be a dangerous mode of construing an act of parliament. The intention of an act, — the gislature, — can known only by which the royal the advice and three estates o parliament assen 456. n.), been pressed.

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ıy debt of the bankrupt, is entitled to prove ommission, or to avail himself of the proof e creditor, to the extent of the money paid rson after the commission issued. In this ɔt owing upon the bill was, no doubt, a debt he plaintiff was liable; and it was a debt of ɔt. In *Yallop* v. *Ebers*, the bill, accepted by f *Yallop*, of which the *Chamberses* were the s not the debt of the bankrupt. The debt lebt which the bankrupt could have been to pay. A party who pays a debt which been proved against the bankrupt's estate, estate to the extent of such payment; and rotected the estate, he is entitled to stand in the creditor whose debt he has so paid.

Rule discharged. (*a*)

plaintiff having rit of error return- Exchequer Chan- was argued before ı C. J., *Parke* B., *Alderson* B., *Wil- rney* B., *Coleridge lfe* B., in *Hilary* *Vict.* (*Tuesday uary* 1842) by

r the plaintiff in argument was, in ne as in the court elied upon *Yallop* *B. & Ad.* 698., *Younge*, 3 *B. &* Ie also cited *Bas- n*, 9 *Bingh.* 653., 777., and com- *Wood* v. *Dodgson*, *elw.* 195., which to, in the course ent, by *Parke* B.

(with whom was ä, was stopped by

Lord *Denman* C. J. It appears that the bills in this case were originally accepted for a valuable consideration; but, in consequence of the arrangement afterwards entered into between the parties, by which it was agreed that the plaintiff should accept two other bills and that the defendant should provide for the former bills, the nature of the transaction was totally changed, and the former bills became, in effect, accommodation bills. The plaintiff then became, as to the former bills, if not strictly a surety for the defendant, yet, at all events, a person liable for the debt of the defendant, within the meaning of the 52d section of the 6 *G.* 4. *c.* 16. The certificate of the defendant was therefore a bar to this action.

Parke B. The original transaction was this:—The plaintiff had accepted two bills drawn

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upon him by the defendant for value. Upon these bills the plaintiff was primarily liable. Before they reached maturity, however, the plaintiff being unable to meet them, an agreement was come to between him and the defendant, that the plaintiff should accept two other bills in lieu of the former, which were then outstanding, and for which it was agreed the defendant should provide. The defendant failed to perform his agreement and became bankrupt, and the plaintiff was afterwards compelled to pay those bills. It appears to me that the character of the original transaction was so far changed by the subsequent agreement, that the plaintiff, who was in the
primarily liable
ceased, as betwee
to be so, and stoo
ation of surety fo
ant. And then,
Van Sandau v. *Co*
Ald. 13., 1 *Chitt.*
other cases, this
demand on the
plaintiff that was
der the fiat again
ant. In *Yallop*
bankrupt was no
bill, which the
accepted; and the
fore, could not
either as "a sure
"a person liable
the bankrupt.
The other judg
Judgm

Nov. 25.

BECKE *v.* CATTELL.

In an action for an attorney's bill of costs, the town agent of the defendant's attorney obtains an order for taxing the bill. The plaintiff cannot call upon such agent to take up the master's allocatur and pay the fees.

So, where part of the business is done in the House of Lords, ficate of the officer of the house is necessary for the purpose o taxing master to complete his allocatur, the court will not compel agent to take up such certificate.

THIS was an action brought to recover of three bills of costs. Messrs. *Aust son* as agents for Mr. *Gery*, the attorney wh the defence of this action, obtained a judg referring to the master for taxation, as well as certain other bills of costs, one of whic the prosecution of an appeal in the Hous which further bills, the plaintiff was ord liver within a month. The bill for busi

ords was referred for taxation to Mr. *Palk*, f the House. The bill was left with Mr. *P. H.*, who attended him thereon. The de- ing become insolvent, *A.* and *H.* declined Mr. *P.*'s certificate. A summons was then by the plaintiff, calling upon *A.* and *H.* to why such a certificate should not be pro- hem; and the following order was made by "I order that the defendant do procure te, and, in default thereof, that the plaintiff to obtain it, and that the master allow the of, and of this order, on taxation." The ving declined to draw up this order,

ilde Serjt., in *Trinity* term last, moved for a upon the defendant and *A.* and *H.* to shew *A.* and *H.* should not, within a week, pro- *Palk*'s certificate of the amount of costs al- him to the plaintiff, or why, in default of his doing, the master should not be at liberty to he plaintiff the amount of costs allowed by upon such amount being verified by the his agent; and why *A.* and *H.* or Mr. *Gery* refund to the plaintiff so much as he might . *Palk*, in order to obtain his certificate. It d that it was the duty of *A.* and *H.* to do all necessary to perfect the proceedings which ommenced. A rule nisi having been granted,

n Serjt. shewed cause. Neither Mr. *Gery* wn agents were bound to go on and disburse the purpose of obtaining Mr. *Palk*'s certifi- their client had become insolvent.

Wilde Serjt., in support of the rule. When present plaintiff had conducted *Cattell*'s suit

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against *Correll* to a successful termination, luded with *Correll* for the purpose of deprivi his costs. [*Tindal* C. J. Is it not the course son who wants to use the allocatur to pay for i wards to get himself reimbursed by the otl No, the town agent is the party to whom officers can look for their fees. He is the pers the officers in motion, and he it is who must business which is done. *Griffiths*, *ex parte*. (*a* Suppose that, instead of stopping short here, th had stopped before, does not this appear to the nature of a neglect to prosecute the order f the bills to be taxed?] The plaintiff migh have succeeded in an application to discharg for taxation upon that ground; but it is sub he was not bound to take that course. If were to pay the 20*l*., he would perhaps be include it in the allocatur; but it may be s universal rule, that an attorney who procure be done, in delay of the adverse party, is b through with it. The court, in the exerci neral jurisdiction over one of its own office permit him to throw an impediment in the prosecution of an order obtained by himself.

Cu

TINDAL C. J. now delivered the judgm court.

This was a rule obtained by the plaintiff, a who had brought an action for his bills of c the defendant his client, in substance and ef on the defendant and Messrs. *Austen* and *London* agents for the defendant, to shew Messrs. *Austen* and *Hobson*, or Mr. *Gery*, t

(*a*) 1 *Madd.* 56., 2 *Rose*, 342.

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the defendant, should not pay to the plain-
n of money as might be paid by the plain-
in the certificate of Mr. *Palk*, the taxing
e House of Lords. The bills of costs upon
ction was brought, and also some other bills
equity suits, and in an appeal to the House
ad been referred to one of the masters of
nder a judge's order to be taxed, and the
the usual course of business, had sent the
to business done in the House of Lords, to
he taxing officer of the House, in order to
ertificate; but the defendant having become
o one was willing to take up the certificate,
or the taxation amounted to a considerable
application, therefore, seeks to compel the
agent in *London*, to procure the certificate,
he taxing fees. The question before us is,
e same, and must be decided on the same
if there had been no reference to the House
ut the application had been made to compel
agent to pay the fees of the master's office,
g the master's allocatur of the costs upon
ed for taxation.

ght have been the effect of such an appli-
ade on the part of the master, or any other
not necessary to determine. (*a*) In the
an application, the principle laid down in
parte (*b*), might, possibly, have applied;
one appeared before the master but the
nt, it might well be argued that the officers
m only, not to the country attorney or the
e fees due to them for taxation of the bill.
an application by the plaintiff in the action;

masters are now
ies, and have no
fees.

(*b*) 2 *Rose*, 342., 1 *Madd.* 56.

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and we are unable to see any principle on wh
enforce any remedy against the *London* a
defendant, in favour of the plaintiff. No au
been cited for our interference; and it woul
be open to this inconvenience, that, by so
we might enable the plaintiff to receive t
taxation, before it had been determined
himself was not bound to pay those costs, b
more than a sixth part of the amount of his
been taken off on taxation.

We therefore feel ourselves bound to
application.

Rule discharged, witho

(*a*) As between an attorney or agent and his own client, the attorney or agent is not bound to proceed if the client omits to supply him with money for disbursements. But he cannot abandon his client on account of his not being supplied with funds, without giving reasonable notice of his intention so to do. Vide *Cresswell* v. *Byron*, 14 *Ves.* 273.; *Rowson* v. *Earle*, *Mood. & Malk.* 538.; *H* 3 *B. & Ad.* 350.; v. *Browne*, 9 2 *Mo. & Scott.* P. C. 715.; *Law* 6 *Car. & P.* 428 v. *Poynton*, 1 *Mayne* v. *Watt*, *Wadsworth* v. *Tyrwh.* 228., 2 665.; *Harris* v. *Tyrwh.* 445., 2 629.

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ouglas *v.* Chalk and Another. *Nov.* 25.

s an action of debt, brought by the plaintiff to the commissioners appointed and acting by virtue of the 41 *G.* 3. *c.* cxxxi. (*a*), 43 *G.* 3. *P.* were authorised to make a rate or rates for paving, &c., to be assouses, &c. within the district, and also a rate or rates for forming, &c. ing centres of squares, to be assessed on the houses, &c. to be erected, pass the squares. The general metropolitan paving act (57 *G.* 3. .) authorises the persons who, under any local act, were empowered for paving, &c., either separately or jointly with other purposes, to h rate as shall be necessary for paving, &c., pursuant to the direction cts and of that act, either separately or jointly for other purposes; at such rates and all rates made with respect to paving, &c., either jointly with any other purpose, by virtue of any local act and ll be laid upon every person who shall inhabit &c. any messuage reet within the parish.

The commissioners under certain local acts for paving, &c.,

a rate, under the metropolitan paving act, if assessed on the inhally, must be confined to purposes in which all parties rated have a est; and, therefore, that a rate, purporting to be made by the comnder the local act, *for the purposes of the same acts*, upon the nerally, is, *ex facie*, bad as being a joint rate for several purposes, purpose, namely, the embellishing of the squares, in which only lass of persons had an interest.

57. enacts "That rate or rates, assessments, shall, ose of *repairing*, *ghting*, *watering*, he streets, squares, blic passages and shall be within this act, be laid by the commisin every year, or ey shall judge it all houses, shops, coach-houses, stavaults, buildings, s in any of the quares, and other public passages and places, in such sum or sums of money as the commissioners shall order and direct; and that one or more rate or rates, assessment or assessments, shall, for the purpose of *forming*, *making*, *inclosing*, *planting*, *ornamenting*, *and embellishing* the centres or areas of the said squares, be in like manner made and assessed on the houses and buildings to be erected and built and to encompass the said squares, in such sum or sums of money as the said commissioners shall order and direct; but so, never-

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c. cxxxix. (*a*), and 55 *G.* 3. *c.* xxv., local act trict within the jurisdiction of the General M

theless, as that such rate or rates, assessment or assessments do not exceed in the whole in any one year the several sums of money next hereinafter mentioned, that is to say, for paving, repairing, cleansing, and lighting the said several streets, squares, and other public passages and places the sum of 2*s.* in the pound, according to the yearly rent or value of such houses, &c. which are or shall be situate within the limits of this act; for forming, making, inclosing, ornamenting, and embellishing the centres, areas, or middle spaces of the said squares which shall be laid out and made within the limits of this act, the sum of 1*s.* in the pound, according to the yearly rent or value of such houses and buildings as shall be erected and built in such respective squares or places; for watching the said streets, squares, and other public passages and places, the sum of 6*d.* in the pound according to the yearly rent or value of such houses, &c., which are or shall be situate within the limits of the act; and for watering such streets, squares, and other public passages and places, the sum of 6*d.* in the pound, according to the yearly rent or value of such houses, &c., which shall be situate within the respective streets, squares, and other public passages and places, from time to time to be watered in pursuance and according to the directions of this act; and that the commissioners shall cause

separate and dist to be kept of th the said respecti assessments, and cation of the same

(*a*) By sect. 2 sect. 37. of 41 G as empowers the to make a rate for *paving, repair* and lighting the st and other places management, an or assessment fo same streets, &c.,

Sect. 26. enact or more rate or ment or assessme the purpose of *rep ing, lighting, and* said several streets other public passa within the limits cited act (41 *G.* and this act, be m assessed by the sioners appointed the same acts i once in every ye if they shall jud (forming one count), upon all son and persons habit, hold, use, sess, or enjoy an warehouse, coach cellar, vault, buil ment in any of th squares, and othe sages and places, or sums of mone commissioners sh direct, so as such assessment or as not exceed in the one year, the sum

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57 G. 3. c. 29. (a), to recover from the de-
l. 2s., being the amount of three several
essments of 23l. 14s. each, alleged to have

ccording to the
r value of such
&c., which are,
ituate within the
first recited act
t."
4. enacts "That
wful to and for
who, under any
cts of parliament
ial or other dis-
he jurisdiction of
powered to make
essments for the
aving or keeping
pavements of any
blic places within
l or other district,
ly or jointly with
s, from time to
ll times after the
s act, for and not-
any provisions or
natters or things
act or acts of par-
ined, to make and
very, or any such
ments as shall be
o time necessary
for *paving or re-*
pavements of the
blic places within
l or other districts,
he direction of the
acts of parliament
chial or other dis-
is act, and for the
all debts, &c.,
tely or jointly for
s, as to such per-
em reasonable and
xceeding in amount
year, double the
s in the pound,

limited and fixed in the local act &c., and that such rates or assessments may be either substituted for the rates or assessments directed by such local act or acts of parliament to be made, for or in respect of the paving and keeping in repair the pavements of such parochial or other districts, either separately or exclusively or jointly with any other objects or purposes, or may be additional thereto, as the persons making the said rates or assessments from time to time at the making thereof may determine and direct; and that such rates and assessments, and also all rates and assessments made and signed from and after the passing of this act, for and in respect of or towards the paving or repairing the pavements of the streets or public places in any parochial or other district, and either separately or jointly with or towards any other object or purposes, by virtue of any local act or acts of parliament, or by virtue of this act, shall be laid upon all and every person and persons who do and shall inhabit, hold, occupy, be in possession of, or enjoy any messuages, tenements, lands, grounds, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings or hereditaments, situate or being within any of the streets or places within the said parochial or other district, and shall be just and equal pound rate,

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been made by the said commissioners on the
1836, the 14th of *December* 1836, and the 1
1837, respectively. Plea — *nunquam indebi*

and shall be laid according to the annual rents or value of such messuage, &c. respectively; and also that all rates or assessments hereafter made by virtue of this act, shall be made and signed, and allowed, and published by the same persons, and in the same manner as hath been directed by the local act or acts of parliament relating to each particular parochial or other district, as to the rates or assessments for such parochial or other district, for and towards the expense of paving and repairing the pavements therein, and either separately or jointly with any other objects and purposes, by such local act or acts of parliament," &c. &c.

Sect. 25. enacts "That in any parochial, or other, district, wherein, by virtue of the local act or acts of parliament, one general rate or assessment only is directed to be made, for the paving and repairing of the pavements therein, as well as for other objects and purposes mentioned in such local act or acts of parliament, it shall be lawful to and for the persons authorised by such local act or acts to make such rate or assessment, to make and sign from time to time such separate rates or assessments for the other objects and purposes mentioned in such local act or acts of parliament, and to make and sign such other separate rate or assessment as may be necessary

for the purposes
repairing the pave
parochial, or other
for the payment o
or annuities charg
or for the paymen
cipal moneys due
become due in re
under and by v
act, or shall and n
sign from time to
rates or assessmen
and towards the
and concerning t
repairing the pave
parochial or othe
for all and every
other objects and
lating to the said
other district men
such local act or a
ment, as such pe
rised by such loc
&c. shall from
deem most expedi
the moneys to be
and by virtue of
rates or assessmen
rates or assessmen
as they shall be
received, or any
such general rat
ments, shall be e
one treasurer or
or persons, and
as one general fu
plied to the purpo
in such local act o
liament and in thi
be paid to differe
or other person or
be considered as
distinct funds, to
part for and tow

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e came on for trial before *Tindal* C. J., at
t *Westminster* after *Michaelmas* term, 1838,
ict was found for the plaintiff, subject to the
se, with liberty to either party to turn it
l verdict. (*a*)

after stating the abuttals of the new parish
t. Pancras, in the *New Road*; that the *New*
rmerly a turnpike road, but by a local act
l into a common highway, and was to be
and repaired as such; that the 59 *G.* 3.
70., made provisions for the repair of the
d footpaths within the parish of *St. Pancras*;
tway on the north side of the church was
footpaths referred to by that act; and that
s of the poor of the parish of *St. Pancras*
ime to time, exercised the power thereby
to appropriate part of the rates raised every
the same act for the purposes mentioned in
tion, — proceeded to set out a copy of the
he 8th of *June* 1836.

was described as an assessment of 6*d.* in the
rack-rent, made on the 8th of *June* 1836, by
sioners authorised to carry into execution the
before mentioned, "upon the inhabitants,
r owners of houses, shops, warehouses,
s, stables, cellars, vaults, buildings, tene-
reditaments, lands and grounds in the several
ares, and places thereinafter mentioned, for
, commencing from the 25th of *March* then
e half of the rate to be payable at, or imme-

---

d concerning the f the streets and in each of such other districts, and towards the other purposes for which separate rates and assessments, or general rates and assessments shall be made, as the persons authorised &c., from time to time, at the making and signing thereof, may determine and direct."

(*a*) *Vide antè*, 374.

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diately after, *Midsummer-day* next, and th
at, or immediately after, *Michaelmas-day* nex
fendants (the churchwardens) and the chu
were assessed at 23*l.* 14*s.*, in respect of
yards of foot and carriage-way at 4*d.* per ya
document concluded thus: — "We, the co
appointed for carrying into execution the
tioned acts of parliament of the 41st, 43d
57th years of the reign of King *George* III
purposes of the same acts, order and make
assessment stated in the foregoing pages, a
the same to be paid to our collector, &c.
our hands," &c.

The rate was signed by six commissioner

The situation of the 1422 square yards
described, the case proceeded to state that
made in consequence of a resolution of the co
appointed under the said acts of parliament,
meeting of the commissioners held in the bo
the commissioners' offices on the 8th of
The resolution was as follows: —

"Resolved — that a rate of 6*d.* in the
rack rent be made for repairing, cleansing,
the several streets, squares, and other places
year, from *Lady-day* last to *Michaelmas-da*
half of the rate to be paid at, or immediately
summer-day next, and the other at, or imme
Michaelmas-day next."

This resolution was confirmed at the n
of the commissioners on the 13th of *July* fol
minutes of the meeting at which the said re
passed, and of the meeting at which the sam
firmed, were, respectively, signed by the ch
also by the clerk of the commissioners.

The rate was not signed at that meeting

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it bore date, but at a subsequent meeting th of *September* 1836.

ne passing and confirming of the said reso- e signing of the rate, the rate was prepared

t-mentioned meeting (14th of *September*) of the board having been called to a nego- took place in 1822 and 1830, between the s of the said trust and the church-trustees n of *St. Pancras*, for paving, lighting, and nd *St. Pancras* church, it was resolved — ustees for building a new church &c., in the *Pancras* shall be rated for 1422 square and carriage way paving round *St. Pancras* e *New Road*, at the rate of 4*d.* per square ate to commence from the 25th of *March*

ution was the first determination of the s to rate or assess the church or the church- he rate for the half-year commencing the *h* 1836. Neither the church, the trustees, chwardens had ever been rated before.

was first demanded by the collector from the church-trustees of *St. Pancras*, on the *ber* 1836.

ng of the commissioners, held on the 14th 1836, the collector reported that he had ation to the clerk to the church-trustees assessed for *St. Pancras* church, when he he church-trustees were not liable; and it "that the churchwardens of this parish essed on the present rate for *St. Pancras* addition to the church-trustees and their s resolution was confirmed at a subsequent l the minutes of both meetings were respec-

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tively signed by the chairman of such res
ings, and also by the clerk of the commiss
The above rate was first demanded by
from the defendants on the 23d of *Decemb*
The other two rates were stated to ha
under nearly similar circumstances, and t
like manner demanded by the collector.
The plaintiff was a commissioner at the
rate was resolved upon. He had ceased
missioner, and acted as clerk, before
signed, and at the times when the several
lating to the two last rates were made a
when they were signed, and when this ac
menced: no appointment in writing of t
clerk was proved.
The defendants were, at the several t
rates were respectively made, and when
commenced, the churchwardens of the sai
church-trustees are the trustees appoint
under the acts of the 56 *G.* 3. *c.* xxxix. a
c. xxiv. The church, at the times when
were made, was a finished building, an
parish church; and the same is not, nor
ants or the church-trustees, rated otherw
said assessments. The churchwardens of
by virtue of their office, trustees of the ch
The case then set out, at considerable
resolutions come to respectively by the d
poor of the parish of *St. Pancras*, the con
paving the *Southampton* estates, and the v
agreements and contracts entered into
bodies between 1822 and 1830 inclusive
which the commissioners paved, lighted,
certain footways in the parish, the directo
and the vestry sharing the expenses of la
pavements between them. The case al

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as within the limits of the said local paving
ie said foot pavements were lighted by the
rs; that the road over the said pavements
hurch was an open public way; that the
mprised in the admeasurement in respect
e churchwardens and the church-trustees
were paved and had been kept in repair
issioners, and that the carriage-ways had
n repair by them, but were not made by

dings in the cause, and also the several
red to, are to be taken as part of the case.
tion for the consideration of the court is,
plaintiff is entitled to recover in this action
of the said three several sums of 23*l.* 14*s.*,
thereof. If the court shall be of opinion
ntiff is entitled to recover the whole, or any
, then a verdict is to be entered for him
unt which the court may think him entitled
But if the court shall be of opinion that
is *not* entitled to recover the same, or any
, then a verdict is to be entered for the de-

the plaintiff's points for argument were
, That the assessment of the defendants in
he church as a public building, is within the
en to the commissioners by the local acts, or
olitan-Paving Act, or one of them. 5thly,
everal rates were good, both in form and

defendants, 1st, That the rates were illegal
2dly, That the church was not liable to be
ly, That the rates, as regarded the church,
sed on a wrong principle; 8thly, That the
bad upon the face of them, in not sufficiently
the purposes for which they were made,

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being expressed to be made generally for
of *all* the acts.

The case was argued, in *Easter* term l
nell Serjt. (with whom was *Bompas* Se
plaintiff, who cited *Rex* v. *Wilson* (*a*), and
(with whom was Sir *T. Wilde* Serjt.) for th
who cited *Loveridge* v. *Hodsoll* (*b*), *Rex*
Calder Navigation (*c*), *Regina* v. *Murphy* (*d*)
pelwardens of Haworth (*e*), *Lanchester* v.
Woods v. *Reed* (*h*), *Rex* v. *Welbank* (*i*),
ningham (*k*), *Attorney-General* v. *Ruper.* (

The judgment was now delivered by

TINDAL C. J. This was a special case, r
the trial of an action of debt brought, by
the commissioners appointed under certai
relating to the paving, &c. of the parish of
against the churchwardens, for the amount
alleged to have been made under the pow
acts, and of the General Metropolitan-Stre
Various objections were made to the le
rates; but, as we consider one of those
be well founded, and that the rates are b
ground of that objection, it becomes unnece
our opinion as to any of the others.

All the said rates are stated, upon the f
to have been made by the commissioner
under the local acts, 41 *G.* 3. *c.* cxxxi
c. cxxxix., and 55 *G.* 3. *c.* xxv., and under

(*a*) 3 *A. & E.* 817., 5 *N. & M.* 119.
(*b*) 2 *B. & Ad.* 602.
(*c*) 2 *B. & C.* 713., 4 *D. & R.* 253.
(*d*) In which a rule for a new trial was made absolute, Q. B. T. 1839.
(*e*) 12 *East,*
(*g*) 5 *Madd.*
(*h*) 2 *M. &*
(*i*) 4 *Maule*
(*k*) 5 *East,* 4
(*l*) 2 *P. Wm*
Ca. Ab. 293.

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ving, &c. the streets of the metropolis, xxix.; and the rates are also expressly ve been made *for the purposes of the same* ne question that has been raised and argued , whether a joint rate on churches, houses, nade for *all* the purposes of the acts referred te. And we are of opinion that such joint be made, and that the rates in question are at ground of objection.

3. *c.* cxxxi. *s.* 37., the commissioners are to make one or more rate or rates for the repairing, cleansing, lighting, watering, and e streets, squares, and public passages and in the limits of the act, upon all houses, in any of the said streets, squares, and pub- and places; and also one or more rate or e purpose of forming, making, &c., and em- he centres or areas of the said squares, or and buildings to be erected and built encom- said squares. Under this act, a joint rate e made for all the purposes of the act; there in the act to authorise it; and the parties able to pay to the expenses of repairing, &c., are a different class from those who are ged with the expenses of embellishing the

3 G. 3. *c.* cxxxix. *s.* 25., so much of the former 3. *c.* cxxxi.) as empowered the commissioners rate for paving, repairing, cleansing, and said streets, &c., and also a rate for watch- e, is repealed. And by *s.* 26., one or more s shall, for the purpose of repairing, clean- ng, and watching the said several streets, &c., nce in every year, or oftener if needful (form- ggregate account), upon every person who it, &c., any house, &c., in any of the said

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streets. In this act also there is nothing rises a joint-rate for repairing the streets a ing the centres of the squares.

By 57 G. 3. c. xxix. s. 24., it is enacted, that it shall be lawful for the persons wh local act, are empowered to make rates for either separately or jointly with other purp any such rates as shall be necessary for pursuant to the directions of the local act act, and for the payment of debts incurred curred, &c., and for payment of interest a &c., or for the payment of principal m separately or jointly, for other purposes, as sons shall seem reasonable; and such ra rates and assessments made with respec either separately or jointly with any other virtue of any local act or this act, shall b every person who shall inhabit, &c., any m within any of the streets within the said other district. Now, the rate authorised by being a general rate on all persons inh dwelling-houses &c. within the district, ca posed to have in view any other purpose wherein the inhabitants of the district gen common interest. Where, as in the pre embellishing the squares, a particular class distinct from the general body of the inhabi the local act subjected to a special rate in particular benefit which they enjoy, it canno the intention of the legislature, by such a se now under consideration, to relieve the par who ought to bear the burden in respect of th they receive, and to cast it upon those who no share, or at least no equal share, of the b

For these reasons, it seems to us, that, a expressions of the section are somewhat large

n legal construction, to be confined to rates
the persons rated, may reasonably be sup-
e a common interest, in respect of the pur-
ich the rates are made.

reasoning will apply equally to the twenty-
of the 57 G. 3. c. xxix., upon which the
he plaintiff mainly relied. By that section
, in substance, that, in any parochial or
t, wherein, by virtue of the local act, one
only is directed to be made for paving, as
ther objects mentioned in such act, it shall
the persons authorised by the local act to
rate, to make separate rates for the other
ioned in the local act, and for payment of
annuities, or for payment of any principal
hey may make general rates, as well for the
paving, &c., as for all and every or any of
jects relating *to the said parochial or other*
ioned in such local act. The object of this
s to be, to give facility to the making of
s where, by the local act, a joint assessment
made for paving and for other objects men-
act; and its effect is, to give an option to
uthorised to make the rates, either to make
te for each of these objects, and a separate
ng, and for paying interest, annuities, &c.,
joint rate for the expenses of paving, &c.,
nd every or any of the other objects relating
; but not to authorise the making of a joint
irpose relating to the whole district and for
ose relating to a part of the district only.
objection being, not merely that the rate is
respect of the sum assessed upon the church
that the rate is a joint rate for several pur-
uthorised by the statutes to be included in
h defect cannot be the subject of an appeal,

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but makes the rates altogether bad, upon laid down in the cases of *The King* v. *We* *The King* v. *Cunningham*. (*b*)

On the ground of the objection, therefo sidered, we think the rate bad, and that the to be entered for the defendants.

Judgmen

(*a*) 4 *M. & S.* 222. (*b*) 5 *E*

Nov. 16.

BERREY *v.* LINDLEY.

A. enters upon premises as tenant to *B.*, under an agreement, not binding under the statute of frauds, for five years and a half from *Michaelmas* 1823. In 1826 a negotiation is entered into for a term of seven years "from the expiration of the present term," at an increased rent, the landlord making some alterations. The alterations are made, but no lease is executed. 1829, a whole year's rent is paid at the increased rate, and payn wards made on the same footing.

Held, that a notice given on the 11th of *March*, 1835, to quit was a valid notice.

THIS was an action of assumpsit broug the sum of 252*l.* for the use and oc dwelling-house of the plaintiff, situate at county of *Middlesex*. Plea: non assumpsi

At the trial before *Coltman* J., at the sitt *minster*, after *Hilary* term 1839, a verdi for the plaintiff, damages 252*l.*, subject to t the court upon the following case:

Previously to *July* 1823, the premises w cupation of *P. Deane* and *J. Deane* as te plaintiff. On the 22d of that month the def and sent to the plaintiff, a letter of which is a copy.

"Sir,—I am willing to take the house, *Deanes'*, for five years and a half, at sixty- year; and I shall be ready to enter into a with you to that effect at any time you

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to state to you that the coach-house and been robbed of part of the lead of the roof, to be made good before I receive posses-

nce of this letter the defendant, with the ie plaintiff, entered into possession of the d became tenant thereof from *Michaelmas* e early part of *September* 1823, the plaintiff raft of a lease of the premises to be sent to t for his approval. On the 20th of *Sep-* the defendant returned the draft lease to with a letter, of which the following is a

dley has to apologise to Mr. *Berrey*, for ied the draft of lease so long. He now re- Messrs. *Deane*'s agreement. Mr. *Berrey* one alteration, or rather addition to the ount of property tax, which Mr. *Lindley* ve inserted; and that is the only matter hes to suggest."

t lease so returned, the words following, viz. alled the property tax, so far as concerns only excepted" were written in pencil in of that part which contained the covenant of the rent clear of all taxes, and again in of that part which contained the covenant oyment of the demised premises, viz. op- at part of the draft lease, which stated endant "should and might peaceably and hold, use, occupy, possess, and enjoy the nises, and every part thereof, with the ap- for and during all the term of five years hereby granted, without any let, suit, or rruption, eviction, or denial of or by the *rrey*, his heirs," &c., the defendant had also

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written in pencil the words following, '
term." With the exception of these two p
the draft lease was returned to the plaintiff
in the same state and condition as it wa
by him to the defendant.

On the 5th of *September* 1826, the de
the plaintiff a letter, of which the followi

"As the time is now approaching w
only will remain of the term for which I
hold my house of you, I wish to know w
disposed to make any alterations in it, i
keep it for a longer period. The hous
enough; but it is not sufficiently capaci
are some little matters which require atte
want to have a room or two added to
which I have had an accurate estimate p
which it appears that the alterations I w
completely effected for 200*l.*, or 250*l.* If
to lay out such a sum upon the premises,
such additional rent as we may agree up
ation of the improvements, and will tak
upon lease for seven, fourteen, or twenty-
the expiration of my present term. Be so
me know what you are disposed to do in
soon as you have made up your mind upo

On the 17th of *February* 1827, the de
the plaintiff a letter, of which the followi

"With reference to our conversation
and for the sake of saving time, I think i
that I have fully made up my mind not to
the cost of the proposed addition to my h
consider wholly a landlord's affair, for w
ling to pay as a tenant. Besides which
sider how much, it is probable that the i
meditate of the premises, will cost me,

f justified in incurring any other expense for to come. You had better, therefore, when end me an agreement upon the terms of 84*l.* ation of your outlay, insurance of house, years lease, &c. signed by yourself, and I t to you, in duplicate, signed by me."

ber 1827, the sum of 137*l.* was laid out in the plaintiff. No lease was ever executed parties, nor was any draft lease (other than referred to), sent by the plaintiff to the de- il after the notice to quit had been given by s hereinafter mentioned.

pts for rent, signed by the plaintiff, bearing ively, the 15th of *October* 1824, 21st of *October* of *January* 1827, 16th of *January* 1829, 10th 1830, and 22d of *October* 1835, were given on the part of the defendant; and it was ad- the moneys therein mentioned had been re- ne plaintiff at the times when such receipts bear date. [The first three of these receipts *l.* 6*s.* each, the fourth for 87*l.*, and the other *l.*, each being "for a year's rent" due at *mas* preceding, except the third, which was "for the balance of rent due at *Michaelmas*

ndant also gave in evidence a letter sent by nt to the plaintiff, on the 15th of *November* ich the following is a copy.

I send you the amount of my rent to *Mi-* 833, viz. 84*l.*, for which, pray let me have a am thoroughly ashamed of being so much d, but I shall be in a condition to pay you this present *Michaelmas* in *March* next, if e me so much time; and after that we shall arly, without my getting into arrear."

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On the 16th of *March* 1835, the defend notice of which the following is a copy, to to the plaintiff.

"I do hereby give you notice that I in possession of all that messuage, tenement, house with the yard, garden, and premises, hold and occupy as your tenant, situated lyi at *Acton*, in the county of *Middlesex*, on or u of *September* next. Dated this 11th day of

On the occasion of the notice being so d plaintiff referred the defendant to his letter set forth, bearing date the 5th of *Septembe* insisted that the defendant was bound to con but which the defendant then denied.

On the 14th of *August* 1835, the plainti defendant a notice of which the following is

"Take notice that I do hereby requir fifteen days from the date hereof, to prepar be prepared, and tender or cause to be te for execution, a good and sufficient lease fo twenty-one years, at the clear yearly rent c house, coach-house, and all other the prem hold and occupy as tenant to me, situate at county of *Middlesex*, pursuant to and in co your agreement or undertaking, bearing d of *February* 1826, and of all other agreem us respecting the said house and premise within the like time, to execute and deli counterpart of such lease, a draft of such previously sent to and left with me for my approbation, or that of some competent pe behalf, I hereby offering to execute such l prepared and approved as aforesaid."

On the 5th of *September* 1835, the plainti defendant the draft of a fresh lease of the

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such draft being in the words following.
nd to hold the said piece or parcel of land,
r tenement, coach-house, stables, and all and
er the premises with the appurtenances unto
n Lindley, his executors, administrators, and
the day of , for and during, and
ll end and term of twenty-one years, from
t ensuing and fully to be complete and
opposite to the blank in the *habendum* was
g marginal note. "This blank must be
h the date of the expiration of Mr. *Lindley*'s
ancy at the time the agreement was entered
npanied by a note, of which the following is

ving received from you a draft lease of my
ur occupation pursuant to the notice I have
I now forward you one for your perusal and
; and am ready and willing to execute a
conformable thereto, you executing a coun-
eof."

lmitted that the said draft lease was in the
s it was in when sent by the plaintiff to the
s aforesaid. On the 12th of *September*, the
attorney returned the last-mentioned draft
plaintiff with a note, of which the following

desire of Mr. *Lindley*, we beg to return you
ase which you have forwarded; as he is not
y agreement as referred to in the margin of
r does he intend altering his arrangements
his occupation at *Michaelmas*, pursuant to
o quit, already given by him in that behalf."

endant remained in actual occupancy of the
om the time of his original entry thereon,

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until the 29th of *September* 1835. The ren
day was admitted to have been paid b
brought.

If the court shall be of opinion that the te
defendant was lawfully determined by the n
expiring on the 29th of *September* 1835; it is
he shall be considered as having relinquis
session on that day, and a nonsuit shall be
on the other hand, the court shall be of
the tenancy of the defendant was not law
mined on that day by such notice to quit,
that the defendant is to be considered as
given up possession of the premises at tha
the verdict for the plaintiff is to stand.

Sir *T. Wilde* Serjt. (with whom was *Robin*
plaintiff. The defendant became tenant to
during the period in question in consequence
ation commencing by the letter of the 5th
1826, by which the defendant proposed to t
mises upon lease for seven, fourteen, or twen
from the expiration of his then term. The
doubt as to the intention of the parties with r
time for which the further tenancy was to last
the documents was signed by the plaintiff. Nei
therefore, operates as a demise; but as the d
tered he became tenant to the plaintiff from
upon the terms of the intended demise. Rent
ingly paid at the rate of 84*l.* per annum. Th
rial fact is the notice to quit. It is submi
defendant held under a yearly tenancy whic
Lady-day 1842. It may be admitted tha
ment did not operate as a demise. The defe
have quitted, or the landlord might have b
ment, though no notice to quit had been giv
side. [*Maule* J. The defendant might have

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notice.] After the expiration of the five years if rent had been paid, a tenancy from year uld have been created. The plaintiff does not draft lease, because that was sent after the quit had been given. What was the effect of on of a tenancy from year to year by these How far is the tenancy from year to year regu- he terms of the prior holding? Do those late the time of quitting, or the length of the e given? That will be seen upon referring orities. An alteration in the amount of the g the tenancy does not determine the existing, new tenancy. *Doe dem. Tilt* v. *Stratton.* (*a*) is cited for the purpose of shewing that either nt have put an end to the tenancy at *Lady-* without notice. The question is, what con- by operation of law, where the party enters greement not creating a legal demise. If *Doe* is an authority to shew that the defendant e quitted without notice at *Lady-day* 1829, f this case are stronger. [*Tindal* C. J. Is it agreement though the interest did not pass?] itted that it is. [*Maule* J. No action could maintained on the letter. Then is it more ence of a negotiation?] Upon the entry, a as created, on the terms of the agreement; *Bromfield* v. *Smith* (*b*), *Doe dem Oldershaw* v. , *Doe dem. Collier* v. *Wells* (*d*), *Doe dem. Martin* e) In *Doe dem. Rigge* v. *Bell* (*g*), Lord *Kenyon* hough the agreement be void by the statute of , as to the duration of the lease, it must re-

ingh. 446., 1 *M.* & *ast*, 530., 2 *J. P.*). *sp. N. P. C.* 106. *T. R.* 478.

(*e*) *Ib.* 83., 2 *Esp. N. P. C.* 500.

(*g*) 5 *T. R.* 471.

(*h*) *i. e.* incapable of being enforced; not, void, if acted upon.

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gulate the terms on which the tenancy subsis respects as to the rent, the time of the yea tenant is to quit, &c. So, where a tenant after the expiration of his term without havi into any new contract, he holds upon the for Now, in this case it was agreed that the defen quit at *Candlemas;* and though the agreeme as to the number of years for which the def to hold, if the lessor choose to determine t before the expiration of the seven years, h put an end to it at *Candlemas.*"

So here, the parties must be presume negotiated upon the understanding that th tenancy was to take effect with reference to t arrangement, under which the defendant v at *Lady-day.* As shewing the terms upon defendant was to hold, the letter of *Sept* clearly admissible in evidence. *Digby* v. *A* was decided upon a principle familiar to namely, where, after the expiration of a wr the tenant has verbally agreed to hold ov an additional rent, he is presumed to hold terms of the former lease, as far as those applicable to his new situation. Why shoul ciple be acted upon in that case, and not party holds over in expectation of a lease to b In *Doe dem. Peacock* v. *Raffan* (*b*) it was held *Ellenborough*, that a stipulation for a mon to quit, contained in an agreement for a le lease was never granted, was applicable to tenancy created by the entering of the party agreement. Lord *Bolton* v. *Tomlin* (*c*) is to effect. Though the tenancy might have b mined during the first five years, by a noti

(*a*) 4 *Campb.* 275.
(*b*) 6 *Esp. N. P. C.* 4.
(*c*) 5 *A.* & *E.* 8 *P.* 247.

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Michaelmas, yet after the expiration of the period of five and a half years, the holding considered as a *Lady-day* holding. In the for a new lease, the parties did not con- hat before the effluxion of the period of the rm, there should be any new taking; as to onus lay on the tenant, who insisted that the us determined, and he had no fact to bring cept the increased rent. But the increase in t of rent had nothing to do with the existing *Doe dem. Bedford* v. *Kendrick* (*a*) the parties have agreed that an additional annual sum paid, as the interest of the plaintiff's outlay. ould have been stronger if an addition had been he rent without any outlay on the part of the But a mere alteration in the amount of the not create a surrender by operation of law. here the landlord agrees to build a barn for the latter agreeing to pay 220*l.* a year instead *Donellan* v. *Read.*(*b*) [*Maule* J. It is impossible sums mentioned in the receipts otherwise than Not pressing this part of the case further, let it d that this is to be considered as an alteration . If the court felt bound to hold that the old put an end to, that would be, to give to the plaintiff a construction contrary to the view the parties themselves. It is sometimes ne- adopt a construction which is opposed to ion of the parties; but that is where such a nstruction is imperatively required by some w. Not having determined the tenancy by ice during the five years and a half, the occu- ust be taken now to have continued during of that period, under the agreement. [*Maule* J.

ms, *Ejectm.*, 2d edit. dit. 144.

(*b*) 3 *B.& Ad.* 899., 1 *Smith Leading Cas.* 144.

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Could the plaintiff have distrained in the tween *Lady-day* 1829 and *Michaelmas* 1 right to distrain may not be material; but have maintained an action? Is the liability to be inferred?] Here, it is expressly stat defendant became tenant upon the terms of ment. *Doe dem. Robinson* v. *Dobell* (*a*), cited appears to have no bearing upon the pr There, no rent was paid.

Erle, for the defendant. The notice t sufficient. It is clear that it was the inten parties that the holding should be from *Mi Michaelmas*. The letter of the 22d of *July* proposal from the defendant, and matter only. Though it is stated that the defendan pursuance of the proposal, it was left perfectl whether the terms proposed in the letter we not accepted. The defendant never had possession which he could have enforced plaintiff. The covenant for quiet enjoymen in the draft lease was to be for the term of and a half, "or for other term." The atten defendant was drawn to the circumstance tha tion of the term was a point left open. T thing to fix the parties with an intention th should continue for the precise period of and a half. The subsequent letter shews t *chaelmas* holding was in contemplation. T mind appears to be impressed with a belie term would expire at *Michaelmas*. [*Tind* think the defendant's entry must be taken to made with reference to a term of five years The payment of rent with reference to a par

(*a*) 1 *Gale & D.* 218., since reported 1 *A. & E.*,

ountervails all that can be extracted from A tenancy from year to year is to be inholding over and paying rent. It is said new tenancy commencing at the expiration nal term of five years and a half. But in obinson v. *Dobell*, where the original term year and a half, and the tenant continued eyond the year and a half, it was held that l occupation did not create a new tenancy, whole must be considered as one tenancy o year, commencing from the first entry, otice to quit at the end of the second year t. *Roe dem. Jordan* v. *Ward* (*a*) and *Doe* v. *Weller* (*b*) were decided upon the same the case cited for the plaintiff, it is assumed ies had come to a new agreement. How the o that conclusion does not appear; nor is it r the present purpose, to inquire.

rjt., in reply. The defendant first relies l of there being any agreement between the the term of five years and a half. It is conceive in what language an agreement term could be more clearly expressed. said that if any agreement for a term of nd a half was made it has been altered. take possession under a proposal for a emise, he must be considered as entering rms of the demise so far as those terms ble to a yearly tenancy. Here, the in- has relation, not to any alteration in the t to money laid out or to be laid out. It led by the defendant that a notice to quit given with relation to the commencement

. *Bla.* 97. (*b*) 7 *T. R.* 478.

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of the holding. That is perfectly true. holding is the notice to have relation? says that both parties had an option with proposed term of five years and a half. biguous term is purposely introduced. done that was inconsistent with the unde defendant was to hold for the original ter and a half. The defendant says, that afte held for several years as tenant from ye may be declared against as having held u for the entire number of years. *Doe de Dobell* is not an authority upon that point

The effect of the agreement between t to create a demise from year to year, wit that the tenancy should not continue for years and a half. The other cases of t which have been cited, carry the matter n *dem. Jordan* v. *Ward* proceeds upon the s There, the tenant was considered as havi the holding should be as from the particu *dem. Collins* v. *Weller*, where the partie terms of a previous holding, is a case of scription. An agreement may here be inf acts of the parties. The words "that is t he wishes to suggest," in the letter of th *tember*, shew that not the slightest inten entertained, of departing from the terms of except in the particular additions made by

TINDAL C. J. The question for our co whether the notice to quit given is or is n

(*a*) That a lessor may so declare, see *Legg* v. *Hackitt*, 4 *Bac. Abr.*, 6th ed. 180., *Leases and Terms for Years* (L. 3.); *S. C. per nomen Legg* v. *Strudwick*, 2 *Salk.* 413.; 1 *T. R.* 390. *Lippincott*, B *Mann. & Ryl* v. *Mackreth*, 2

the tenancy which subsisted between these
he validity of the notice depends upon this
ng a holding from *Michaelmas* to *Michaelmas*.
contended that the cases which have been
were not properly decided. It appears
iginal entry of the defendant upon the pre-
at *Michaelmas*, and that rent was paid every
r rent due at *Michaelmas*. That, unless an-
ms a strong case in favour of the supposition
elmas holding. The defendant entered under
agreement for five years and a half. This
nount to an actual demise of the premises,
had been made, would have left no doubt.
e there was originally a tenancy from *Mi-*
Michaelmas, with liberty to either party
end to the tenancy without notice, in the
ne whole period of five years and a half being
run out. Supposing the understanding to
that the new arrangement should take effect
fter the determination of the first agreement,
rties to have gone on upon a new agreement
g from the determination of the old one, I
isfied that it can be inferred that it was the
f the parties that the holding should be a
nolding. In the letter of the 5th of *September*
"as the term is now approaching when two
will remain of the term for which I have agreed
house of you, I should wish to know whether
posed to make any alterations in it, if I con-
ep it for a longer period." I would not rest
y on that letter. The writer may have forgotten
atter stood. On the other hand, the landlord
ppear to be very certain as to the period at
new tenancy was to commence; for when the
is sent, a blank is left for the day on which
rm is to commence. The defendant's letter

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concludes thus: "If you are willing to la
sum upon the premises, I will pay you su
rent as we may agree upon in consideratio
provements, and I will take the premises u
seven, fourteen, or twenty-one years *from t*
of my present term." If this proposal had
diately accepted, I should have said that th
referred to the expiration of the term of fi
a half. Instead of this, the parties go on
and the terms are varied; and in the defe
of the 17th of *February* 1827, he says, "Yo
when you write, send me an agreement up
of 84*l.* rent in consideration of your outlay,
house, *twenty-one years' lease*, &c., signed
and I will return it to you, in duplicate, si
This differs from the terms proposed i
letter. After this we find the rent of 84*l.*,
rent mentioned in the letter of the 17th
1827, paid, as before, as a yearly rent du
mas. The question, therefore, is, whethe
be fairly inferred that in 1827 the parties
understanding that there should be a ne
from *Michaelmas.* This appears to me to
construction to be placed upon the con
parties. I therefore think that at the time
in question was given by the defendant,
yearly tenant from *Michaelmas* to *Michaelm*
sequently that such notice was sufficient.

COLTMAN J. A party who enters unde
ment void by the statute of frauds, beco
statute tenant at will to the owner, and the
scribed in the statute as a tenancy at will ha
construed to enure as a tenancy from year

(*a*) So, it is said by Lord *Kenyon*, in *Clayton* v. *Blakey*, 8 *T. R.* 3., "W considered as a

enant may quit without notice, and be ejected ice, at the expiration of the period contemne agreement; *Doe dem. Tilt* v. *Stratton.* (*a*) iently to that period, the tenant goes on rent, I think he must be considered as tenant ice to the period of the original entry, unless appears which shews that a different arrangecome to. Here, the letters shew that the ered into a negotiation for a term of seven, r twenty-one years, to commence from *Lady*the defendant did not enter under that negowas in possession before. It is convenient rt from the general rule of construction in ancies from year to year; which rule is, that r giving notice to quit is fixed and determined

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en properly *con*nure as a tenancy year." It is bever, that no case that a lease for ree years, not rewriting, shall opeto create a tenancy year. *Clayton* v. n action for double lding over. The stated a holding rtain *term* (*vide* determined on the y 1798; the other d, a holding from determined at the . The defendant two or three years demise for twentys the plaintiff does to have included ent in his declara- be presumed that ent, up to the 12th 98, had been paid. ant, having entered as tenant at will under the statute, would, like any other tenant at will, be converted into a tenant from year to year as soon as yearly rent had been paid and accepted. *Vide Doe dem. Hollingsworth* v. *Stennett*, 2 *Esp. N. P. C.* 717.; *Thunder dem. Weaver* v. *Belcher*, 3 *East*, 449.; *Richardson* v. *Langridge*, 4 *Taunt.* 128.; *Knight* v. *Benett*, 3 *Bingh.* 361., 11 *B. Moore*, 222.; *Cox* v. *Bent*, 5 *Bingh.* 185., 2 *M. & P.* 281.; *Regnart* v. *Porter*, 7 *Bingh.* 451., 5 *M. & P.* 370.; *Doidge* v. *Bowers*, 2 *M. & W.* 365.; *Mann* v. *Lovejoy*, *R. & M.* 355.; *Chapman* v. *Towner*, 6 *M. & W.* 100. And see *Denn dem. Warren* v. *Fearnside*, 1 *Wils.* 176.; *Right dem. Flower* v. *Darby*, 1 *T. R.* 159. 163.; *Goodtitle dem. Gallaway* v. *Herbert*, 4 *T. R.* 680.

(*a*) 4 *Bingh.* 446., 1 *Mo. & P.* 183.

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by the period of the original entry. I thi
that a nonsuit ought to be entered.

MAULE J. I also am of opinion that t
is entitled to judgment, on the ground that
quit given by him, was sufficient to d
tenancy. It is admitted, on all hands, that t
upon his entry (*a*), became tenant from
on the terms of the letter of the 5th of
far as the terms of that letter were ap
tenancy from year to year. Parties may
there shall be a tenancy from year to year
at a particular time. If a party enter unc
agreement, or under an agreement not am
demise, he may still hold, subject to the
agreement, so far as they are not at varia
species of tenancy which the law, under
stances, creates. The effect of what passe
parties appears to me to be this: the defe
tenant to the plaintiff from year to year, fro
1823 for so long time as they should respe
determinable at the end of any year at
notice, the defendant to go out at the end
and a half *without* notice. It is clear that
in this special case would not be sufficient
verdict.

In the letter of the 5th of *September*
fendant proposes to take the premises for
term, provided the landlord will lay out
tain alterations. That proposal was never
The negotiation between the parties in *F*
does appear to have been acted upon.
to see what rent the defendant paid. A s
stated to have been paid as for rent fro

(*a*) *Vide suprà*, 512. (*a*).

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ichaelmas 1829. That payment appears to l conclusive evidence that the letter of the *ruary* had been considered by the parties as for a new *term;* and that they *agreed* to a n year to year; and that the defendant was the state of tenant from year to year as *chaelmas* 1828 at the latest. By the conduct s and by their agreement, the tenancy was a holding, and this notice to quit given on the *rch* to determine the tenancy at *Michaelmas* e a valid notice.

Nonsuit entered.

Nov. 19.

E *v.* The GREAT WESTERN Railway Company.

Case against a railway company for so carelessly and improperly managing and directing an engine on their railway by their ser-

The declaration stated that the plaintiff, fore, to wit, on the 16th of *April* 1839, was ssessed of a certain rick or stack of beans livers, to wit, forty quarters of beans, of great it, of the value of 70*l.* then standing and d upon a certain field or parcel of land of , situate in the county of *Bucks*, and near to

arks flew from the engine upon a stack of beans standing in an d, belonging to the plaintiff, whereby the stack was destroyed.

ted for the opinion of the court, under the statute, alleged that sed upon the railway were such as were usually employed on rail- purpose of propelling the trains and carriages thereon; and that om which the sparks that set fire to the stack in question flew, was me in the ordinary manner, and for purposes authorised by the act incorporating the company.

t the facts stated were not sufficient to enable the court to infer n the part of the defendants, so as to justify the directing of the rdict for the plaintiff; but that they did not show such an absence e as to warrant the directing of the entry of a nonsuit; and the was withdrawn in order that the parties might go on to trial.

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a certain railway or railroad, there used a
by the defendants for the purpose of drivi
pelling from time to time, in and along th
tain steam-carriages and engines contain
igneous matter, to wit, in the county afores
defendants were also then, to wit on the
aforesaid, to wit, in the county aforesaid, p
certain steam-carriage and engine contain
igneous matter, which was then driven and
and along the said railway or railroad ne
rick or stack of the plaintiff, and was th
care and management of certain persons
servants and agents of the defendants, wh
and there regulating and directing the sa
defendants, by their said servants and age
there, *so carelessly, negligently, and improp*
and directed their said steam-carriage and
the said fire and igneous matter therein then
aforesaid, that by and through the careles
gence, and improper conduct of the defend
said servants and agents in that behalf, div
fire and divers portions of the said fire
matter then and there passed, and flew fro
the said steam-carriage and engine of the
to, into and upon the said rick or stack of
and by means thereof the said rick or stack
tiff being of the value aforesaid, then and
ignited, and was thereupon, and by means
mises then and there wholly burnt, consu
stroyed; and by means thereof the plaintif
lost and been deprived of the use and bene
rick or stack of beans, and was and is othe
injured and aggrieved, &c.

The defendants pleaded not guilty.

The facts were stated for the opinion
under a judge's order, pursuant to the statut
c. 42. *s.* 25. as follows: —

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endants are a company duly incorporated by of "*The Great Western* Railway Company," by virtue of an act of parliament passed in *W.* 4. *c.* cvii., intituled, "An act for making a m *Bristol*, to join the *London* and *Birmingham* ar *London*, to be called *The Great Western* vith branches therefrom, to the towns of *Brad-Trowbridge*, in the county of *Wilts*." The rail- the defendants have made under the provi- is act, extends along the extremity of, and y adjoins, a field of the plaintiff, situate in the *Burnham*, in the county of *Buckingham*; at eastern extremity of which field, the plaintiff l the stack of beans mentioned in the declar- e distance of about eleven yards from the rails he railway carriages and engines of the com- the said stack being placed close adjoining ry or fence of the said railway.

k of beans in question contained about forty beans, and was ignited by means of certain ire, which were emitted from one of the en- e defendants which passed along the railway spot above mentioned, about half-past five the afternoon of *Tuesday* the 16th of *April* the whole was, in consequence, consumed, of the fence rails adjoining.

gine and boilers used upon the said railway s are usually employed on railways for the propelling the trains and carriages thereon; gine from which the sparks flew, which set tack in question, was used at that time in the anner, and for the purposes authorised by arliament.

89th section of the act above referred to, the ere empowered to regulate the passage on , and manage and direct the use thereof. By

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fendant took them off as soon as he cou
the same trespass; and the plaintiff de
adjudged for the plaintiff; for though a
lawful thing, yet, if any damage do here
other he shall answer it, if he could hav
As if a man lop a tree, and the boughs
ther, *ipso invito*, yet an action lies. If a
butts, and hurt another unawares, an ac
have land through which a river runs to tu
and I lop the sallows growing upon th
which accidentally stop the water, so as
hindered, an action lies. If I am build
house, and a piece of timber falls on my
house and breaks part of it, an action lie
assault me, and I lift up my staff to de
and, in lifting it up, hit another, an actio
person; and yet I did a lawful thing. A
of all these cases is, because he that is da
to be recompensed. But otherwise, it i
cases, for there, "*actus non facit reu
sit rea*" (*a*); *Underwood* v. *Hewson* (*b*);
Stampe (*c*); and *Dickenson* v. *Watson* (*d*); a
effect. In *Wakeman* v. *Robinson* (*e*) it was
one does an injury by unavoidable accide
does not lie; *aliter*, if any blame attaches to
he be innocent of any intention to injure.
said by *Dallas* C. J., that "if the accide
entirely without default on the part of the
blame imputable to him, the action do
[*Tindal* C. J. You have one more step t
must shew that trespass would have lain i
Scott v. *Shepherd* (*g*) is an authority that h

(*a*) *Sir T. Raymond*, 422.
(*b*) 1 *Strange*, 596.
(*c*) 1 *Ld. Raym.* 264., 1 *Salk.* 13., *Skinn.* 631. *Carth.* 425.
(*d*) *Sir T. Jo*
(*e*) 1 *Bingh.* *Moore*, 63.
(*g*) 3 *Wils.* 4

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ve been supported against the company's ser- *Leame* v. *Bray* (*a*), Lord *Ellenborough* says (*b*), not find that distinction laid down in any ases, that in order to maintain trespass, the be wilful." *Underwood* v. *Hewson*, already ems in principle very like the present case. *Bell.* (*c*) It is submitted, that trespass might n brought against the conductor of the engines; plea by him would have been good that did that the accident was entirely without his *Tindal* C. J. Where a servant drives his mas- iage against the carriage of another, trespass brought against the servant, and inevitable would form the only excuse. But if an action se be brought against the master, the inquiry s been, not whether the injury was the result ble necessity, but of negligence on the part rvant. *Maule* J. Do you say that this de- would have been good if it had omitted the at the defendants by their servants "so care- c. managed and directed their said steam- &c."?] In an action against a master for his servant, the statement in the declaration sness is only introduced to shew that the act ilful, for if it was, the master would not be [*Maule* J. If the word negligence is to be un- as meaning not wilful, must not the plaintiff t to be the case? *Tindal* C. J. The rule is nust recover *secundum allegata probata.*] It is that the facts of the case shew that the de- had been guilty of negligence. For as it that the engine was liable to emit sparks, dants were bound to take care that such d no harm. [*Tindal* C. J. If the case had

East, 593.
bid. 594.

(*c*) 5 *M. & S.* 198.

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gone to trial, and the plaintiff had proved t
gines had frequently set fire to stacks, that
shewn negligence; but it does not appear th
accident had ever happened before. *Ma*
case does not state that sparks had ever
come from the engine.] In *Christie* v. *Gr*
an action against the proprietor of a stage
negligence, whereby the coach broke dow
plaintiff travelling by it as a passenger was
held, that proof of the coach having broke
primâ facie evidence, from which negligence
inferred. So here, a *primâ facie* case of ne
disclosed by the facts stated.

Bompas Serjt. The plaintiff is bound to
gence; the onus does not lie on the defend
prove it. This case is clearly distinguis
Christie v. *Griggs*, which was an action o
for not properly conveying the plaintiff.
states the engine to have been used "in t
manner;" if the engine itself was defective,
have been mentioned. [*Tindal* C. J. The
does not complain of the engine being a
engine, but of carelessness in conducting it.
The plaintiff says, that the defendants, in
the engine in their ordinary manner, were
carelessness.] This being an ordinary engin
in the ordinary way, the defendants are
sible for the damage which ensued. In
Pease (*b*) it was held, that an indictment for
against a railway company, for using loco
gine on a railway, (which the company were
to do by an act of parliament,) placed so
ancient highway as to frighten the horses

(*a*) 2 *Campb.* 79.

(*b*) 4 *B. & Ad*
M. 690.

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ghway, could not be sustained; inasmuch as of such locomotive engines was authorized islature. Here, the defendants are authorized act to run engines on their railway; and if nes are dangerous by reason of the sparks the plaintiff should not have placed his stack It is not enough for the plaintiff to shew the he must distinctly prove it occurred through *gence* of the defendants. It cannot be as- hat because sparks came from the engine, negligence; for the onus clearly lies on the shew negligence.

ll Serjt. in reply, was stopped by the court.

. C. J. It seems to me, that we cannot come onclusion upon the facts stated in this case. nded on the part of the defendants, that the ould be nonsuited; but I am not prepared to the fact of the engine emitting sparks may nt to negligence. On the other hand I can- hat a verdict ought to be entered for the I think that the special case should be with- d that the parties should go on to trial. To e plaintiff to recover, he must either shew elessness by the defendants, or lay facts before rom which it may be inferred. All, however, an say is, that upon the case before us, the ught not to be nonsuited.

AN J. I am of the same opinion. This is not of case which the statute contemplated should for our consideration.

J. If the court were called upon to decide f fact, there would probably be a difference of

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opinion. I agree with my lord, that the pl
not to be nonsuited upon the facts laid befo
case should be submitted to a jury.

Case wi

(a) No question was raised in the principal case (or in *Vaughan* v. *Menlove*, 3 *New Cases*, 468., 4 *Scott*, 244., 7 *C. & P.* 525.), as to any protection afforded by 14 *G.* 3. *c.* 78. *s.* 86. With respect to the common law liability v. *Finglam*, *P.* pl. 5.; *M'Kens* 10 *Bingh.* 385., 249.; and the in 1 *Roll. Abr.* 215.

Nov. 19.

SIEVERS *v.* BOSWELL and Oth

To an action for money had and received, brought by a bankrupt to recover a sum paid to the defendants to induce them to sign the bankrupt's certificate, a plea that the money had been demanded by and had been paid to the assignees before the commencement of the suit, is a sufficient answer.

A certificate obtained by giving money to a creditor, to induce him to sign it, is void.

DEBT, for money had and received, an count stated. Pleas, never indebted; an the accruing of the causes of action, to wi of *July* 1835, a fiat in bankruptcy was gr the plaintiff, under which he was duly decl rupt; that *James Clark* was duly appoi assignee, and the defendant *Boswell*, credit of the estate and effects of the plainti assignees required the defendants to pa money mentioned in the declaration; and assignees being entitled to the said money, th on the 15th of *May* 1840, and before th ment of the suit, paid them the same in s the causes of action in the declaration ment plaintiff joined issue on the first plea, and tr the assignees were entitled to the causes of declaration mentioned.

The cause coming on for trial before *Ti* the sittings for *Middlesex* after *Michaelma*

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vas taken for the plaintiff, debt 50*l.*, damage
40s., subject to the following case: —
4th *July* 1835, a fiat in bankruptcy was
gainst the plaintiff, under which he was duly
bankrupt by *Joshua Evans*, Esq., one of the
ners of the court of bankruptcy, who, on
day, duly appointed *James Clark* to be the
ignee of the plaintiff's estate and effects, under
t; and at the first meeting of the creditors of
ff duly holden, the defendant *Boswell* was
and chosen assignee; which choice was duly
d confirmed.
intiff, at the time he was declared bankrupt,
ed to the three defendants, who then carried
ss as coal-merchants in co-partnership to-
the sum of 828*l.* 17*s.* 2*d.*, and the defendants
d to sign his certificate; but, in *August* 1836,
lant *Boswell* undertook to obtain the signa-
e certificate of himself and the other two de-
is co-partners, in consideration of the plain-
g to him 200*l.*; 25*l.*, part of the amount, to
wn immediately in money, and the remaining
secured by the plaintiff's warrant of attorney
ndants, and by his accepting seven bills of
for 25*l.* each, payable at intervals of three
m each other, as a further security.
10th of *August* 1836, in order to induce the
to sign the plaintiff's certificate of conformity,
ff paid the defendant *Boswell* 25*l.* in money,
xecuted a warrant of attorney for 175*l.* to the
, and accepted seven bills of exchange drawn
ndants on the plaintiff for 25*l.* each, payable
s of three months from each other, and deli-
warrant of attorney and bills so accepted to
lants; and thereupon the defendants, on the
signed the plaintiff's certificate, and the same

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was afterwards duly allowed by the cou
The first of the said seven bills of exchan
the 11th of *November* 1836, and was pre
plaintiff for payment on that day, but was
whereupon the defendants threatened the
legal proceedings for the recovery of
thereof, unless the same was instantly paid
upon the plaintiff, in order to prevent su
ceedings, paid to the defendant *Boswell*, o
November 1836, the said sum of 25*l.* in
bill mentioned.

On the 11th of *February* 1840, the plain
of the defendant *Boswell* repayment of
several sums of 25*l.* and 25*l.* so paid t
plaintiff on the said 10th of *August* and 15t
1836, as aforesaid; which was refused; an
of *April* following the plaintiff commenc
against the defendant *Boswell* alone for th
the said two sums; to which action the defe
pleaded the non-joinder of his co-partners,
defendants, in abatement, and thereupon
discontinued the said action against the d
well, and on the 26th of *May* 1840 the p
was commenced.

Before the present action was commer
fendant *Boswell* gave information to the offi
James Clark, of the circumstances under w
tificate was obtained, and of the paymen
sums of 25*l.* each; and on the 15th of *M*
official assignee, at the desire of the defen
wrote and sent to the defendant *Boswell* a l
that the certificate of the plaintiff had been
fraud; that the said two sums of 25*l.* eac
the defendant *Boswell* as aforesaid, formed
estate of the plaintiff, and requesting the de
well to pay the said two sums of 25*l.* each
James Clark, as official assignee; and th

Boswell, on the same day, paid the said *James* same, and part of the money so paid was d by the said *James Clark* for the purposes krupt's estate, and in payment of the solicitor's the assignees, and otherwise.

stion for the opinion of the court is, whether f is entitled to recover the said two several 5*l.* and 25*l.* so paid by him to the defendants circumstances aforesaid, or either of them. rt shall be of opinion that the plaintiff is en- cover the said two sums of 25*l.* and 25*l.*, then already entered for the plaintiff as aforesaid If the court shall be of opinion that the entitled to recover the sum of 25*l.* only so e plaintiff to the defendants on the 10th of 36, then the verdict already entered for the to be reduced to 25*l.* If the court shall be that the plaintiff is not entitled to recover hose sums, then the verdict already entered intiff is to be set aside, and a verdict is to be r the defendants.

Serjt. (with whom was Sir *John Bayley*), for ff. The questions to be considered in this first, whether, under the circumstances, the certificate is void; and, secondly, if so, whe- validity can be set up by the defendants.

espect to the first point, there is a striking between the provisions of the 5 *G.* 2. *c.* 30. and e 6 *G.* 4. *c.* 16. By the former statute (s. 7.), upt having duly surrendered and conformed was declared to be discharged from all debts him at the time of his bankruptcy; and if impleaded for any debt due before he became it was enacted that his certificate should to a verdict, *unless the plaintiff in such action*

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could prove the said certificate was obtained u
fraud. And by the tenth section it was p
no discovery upon oath, or solemn affirm
made by any bankrupt of his estate and
suant to that act, should entitle such ban
benefits allowed by that act, unless the c
authorised by such commission, or the n
them should in writing under their han
certify to the Lord Chancellor &c. that su
had made a full discovery of his estate an
in all things conformed himself according
tions of the act, and that there did not ap
any reason to doubt of the truth of such
that the same was not a full discovery of a
rupt's estate and effects, and unless four p
number and value of the creditors of su
who should be creditors for not less than
tively, and should have duly proved their
such commission, should sign such certifica
their consent to such allowance and certif
the said bankrupt's discharge, in pursuanc
to be also certified by such commissione
such commissioners should not certify the
such bankrupt made oath or affirmation th
tificate and consent of the creditors the
obtained fairly and without fraud. The
of the 6 *Geo.* 4. *c.* 16. enacts "that eve
who shall have duly surrendered, and in al
formed himself to the laws in force conc
rupts at the time of issuing the commission
shall be discharged from all debts due by h
became bankrupt, and from all demands
provable under the commission, in case he
a certificate of such conformity so signed
and subject to such provisions as hereinaft
And sect. 122., after stating the number of

certificate is to be signed, provides that "no
ficate shall be such discharge, unless the com-
shall, in writing under their hands and seals,
the Lord Chancellor that such bankrupt has
ll discovery of his estate and effects, and in all
formed as aforesaid, and that there does not
y reason to doubt the truth or fulness of such
and also that the creditors have signed in
ereby directed, and unless the bankrupt make
riting that such certificate and consent were
vithout fraud."

the former act the creditor was made a party
tificate; whereas, under the latter, the creditor
gns to assent to the bankrupt's discharge.

Serjt. It has been expressly decided in *Horn* that it is a good answer to a plea of bank-
at the certificate has been obtained by fraud, the enactment to that effect in the *5 G.* 2. is not repeated in the 6 *G.* 4. *c.* 16.] In *Horn* question, what is fraud under the latter sta-
not raised. Although it is a fraud for a cre-
xtort money from a bankrupt for signing his , the latter can hardly be said to be guilty of a paying it, as it is obtained from him under The parties, therefore, cannot be said to be *licto*. *Browning* v. *Morris* (*b*), *Smith* v. *Brom-*
Tindal C. J. Although there is some differ-
een the form of the certificate under the new ld statutes, the effect of it is substantially the d there can be no doubt that a certificate ob-
the manner that this has been, is void.]

ing the certificate to be void, it is submitted defendants cannot avail themselves of its in-
for they are not to be allowed to take advantage

. & Ad. 78., 1 *N. &*

(*b*) *Cowp.* 790.
(*c*) 2 *Dougl.* 696. n.

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of their own fraud. If the defendants ha money over to the assignees, they have don own wrong. [*Maule* J. The assignees hav say that the certificate is void. They have received the money: are the defendants be the money twice over?] If the court shoul against the plaintiff, the effect of the decisio enable a creditor who has extorted money f rupt, to retain it. The object of the statute vent a creditor from keeping money receive the bankrupt's certificate. If such credi up that the certificate is void, it will be in the bankrupt to recover the money paid, sequence will be that the certificate will valid. A creditor who has signed a deed trader has conveyed away all his property up such deed as an act of bankruptcy; *Bacon.* (*a*) The principle of the law is, th shall be allowed to set up a fraud to which a party; *Montefiore* v. *Montefiore* (*b*); *Doe* v. *Roberts* (*c*); *Lord* v. *Wardle.* (*d*) [*Mau* the defendants are not setting up their own plaintiff declares that the transaction was and the defendants admit it was; but say th paid the money over to the assignees.] It that, as against an innocent assignee, the pla set up the fraud; but he may as against th *Boswell*, who appears to have got the official ask him for the money in order to prevent from recovering it. [*Tindal* C. J. The mo in point of fact, been paid over to the ass can the plaintiff recover it as money had a to his use?] The defendant *Boswell* ha himself in such a situation that he can

(*a*) 2 *T. R.* 594.
(*b*) *Coop. C. C.* 250.
(*c*) 2 *B. & A.*
(*d*) 3 *New Ca*

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er as against the plaintiff or his co-assignee, iswerable to both parties.

d Serjt. (with whom was *Hayes*), for the de- was directed by the court to confine his argu- ie second point. It is a fallacy to say that the s seek to set up any fraud;—the fraud is part ntiff's proposition. In order to make out his nust shew that the certificate is void, having dulently obtained; for the mere fact of the f the money would not entitle him to recover ayment having been made voluntarily and with e of the facts. To give him any right to sue ney, the plaintiff must establish that his certifi- in suspense, and that the money and bills n to the defendants to induce them to sign; s would shew the certificate to be void; *Horn* The defendants admit the invalidity of the and say that the money has been paid to the In *Crofton* v. *Poole* (*a*), where an action was y an uncertificated bankrupt for a demand by his assignees, it was held that the defend- under the general issue, give in evidence the f the debt to the assignees between the suing writ and the declaration. Here, the circum- t the defendant *Boswell* was an assignee makes ice. It was clearly his duty, when the bank- ed the money, to pay it to the official assignee. 25*l.* paid to the defendants on the 10th of 36, before the signing of the certificate, a right for its recovery vested in the assignees on the the consideration. And with respect to the in respect of the first bill of exchange, although tiff might have set up the illegality of the

(*a*) 1 *B.* & *Ad.* 568.

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transaction to an action upon the bill, yet the money with a knowledge of all the facts now recover it; *Wilson* v. *Ray.* (*a*) In therefore, of the main question as to fraud, cannot maintain the present action. With that question, it is submitted, that, although rule is, that a person cannot set up a fraud is a party, here such fraud forms a necessa the plaintiff's case.

Bompas Serjt. was heard in reply.

TINDAL C. J. It does not appear to me cision in favour of the defendants will mi against the authorities in which it has been that money paid by a bankrupt to a creditor him to sign his certificate, may be recovere much more is involved in the present questi simple proposition which was raised in This is an action for money had and receive fendants, however, previous to the commenc action, have, on the demand of the person en to receive it, paid the money over to him, a the equitable ground in which the action is does not exist. I agree with the proposi party to a fraud cannot set it up as a defenc the defendants do not rely upon the fraud, b thing which took place after the fraud had by the plaintiff. If the plaintiff makes the of his case, the defendants have a right to thing beyond which amounts to an answer t The present case falls within the distinctio *Trevivan* v. *Lawrance* (*b*), "that where the pl is by estoppel, and the defendant pleads

(*a*) 10 *A. & E.* 82., 2 *P. & D.* 253.

(*b*) 1 *Salk.* 2 *Raym.* 1036.

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ury are bound by the estoppel; for here is a plaintiff that is a good title in law, and a f the matter had been disclosed and relied ling; but if the defendant pleads the special l the plaintiff will not rely on the estoppel ay, but takes issue on the fact, the jury shall nd by the estoppel; for then they are to find the e fact which is against him." Here it seems e part of the plaintiff's proposition that the titled to the money is the assignee; for it the plaintiff's own shewing that the certifi- obtained by fraud. If that be so, and the as taken advantage of the invalidity of the I do not see on what ground we can give the opportunity of compelling the defendants to oney twice over. I think that upon the plead- facts of this case, the defendants are en- e verdict.

AN J. I should have been desirous to give his action if it could have been done on legal for although the plaintiff cannot be considered m blame, he is in some degree to be looked an oppressed person. Here, however, the s found its way to the true owner. We must here are good grounds before we call upon dants to pay it twice over. It is said that the s are estopped from setting up their own at I think the true answer has been given to ment, and that it is the plaintiff who relies on l, the defendants' case being that they have money over to the party who was entitled to it.

E J. As the money has got to the right person, ice has been done, I feel no reluctance in hold- the plaintiff is not entitled to recover. The

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effect of a certificate, whether under the statute, is substantially the same, that the charge the bankrupt from his liabilities; quently the cases decided upon the 5 *G.* applicable to the 6 *G.* 4. *c.* 16. With re right of the defendants to set up a fraud to have been parties, the answer is, that it is who alleges the fraud, and the defendants to avail themselves of the benefit as well vantage arising from such fraud. The def received money which the plaintiff has prov to his assignees. I cannot conceive that rule of law to prevent them from saying th paid it to those assignees. The plaintiff s defendants are estopped to set up such a that is not so; for the issue is, whether the did not belong to the assignees. The plain not entitled to recover; for, by his own proc himself out of court.

Postea to th

Nov. 6. 22.

BRUNT *v.* WARDLE.

A plaintiff may be admitted to sue *in formâ pauperis*, after the commencement of the suit.

STORKS Serjt. had obtained a rule, ca plaintiff to shew cause why an order, ma bers by *Coltman* J., on the 23d *October* 1 not be rescinded. It appeared from the a the writ of summons in this cause had bee the 22d *October* 1840, and served on the 30 an appearance was entered on the 6th *Nove* ing. On the 26th *June* 1841 a declaration w together with an order of the above learned ing that date, admitting the plaintiff to s

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The defendant thereupon took out a sum-
ng on the plaintiff to shew cause why the
e 22d of *June* should not be rescinded, upon
that such order could not be made after the
commenced. The parties having, on the
attended the same learned judge, he, on the
f *Foss* v. *Racine* (*a*) and *Lovewell* v. *Curtis* (*b*),
he order of the 22d of *June*. The plaintiff
ly took out a summons to rescind the order
f *July*, which was attended before the learned
e 22d *October*, who, upon *Casey* v. *Tomlin* (*c*)
by the plaintiff, rescinded his order of the
leaving the parties to apply to the court.

Serjt. now shewed cause. The question to
ned is, whether the plaintiff may be admitted
rmâ pauperis after the commencement of the
Foss v. *Racine*, the court of Exchequer in-
he opinion, that a party could not be ad-
sue *in formâ pauperis, pendente lite;* and in
Curtis, they expressly decided that such an
vas irregular. (*d*) However, in the recent case
Tomlin, that court appears to have doubted
priety of its former decision, and to have left
on open for further consideration. Lord
ere said, "I am strongly inclined to think
dmission of a plaintiff as a pauper after the
nent of the suit, is irregular. The statutes
be directly against it; but, nevertheless, if
any decisions the other way, or any inveterate
that effect, the court would be anxious not
it." (*e*) On the following day Lord *Abinger*
e have looked into the case which was re-

. & *W.* 610., 7
203.
& *W.* 158., 7 *Dowl.*

(*c*) 7 *M.* & *W.* 189., 8 *Dowl. P. C.* 892.
(*d*) *Sed vide post*, 542.
(*e*) 7 *M.* & *W.* 194.

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ferred to yesterday in *Andrews's Rep.*, *Lan* *erby*, and it appears that there the cou by implication they had, under the 11 *I* power to admit a party to sue *in formâ pa* stage of the cause. The present rule, t not be absolute in all its terms, but as to t of it only; whereby the defendants will l obtain their costs out of the money paid i *must be understood that we give no opinion o of dispaupering the party*, but confine ou the latter part of the rule." The question still open for decision; and if, as seems thought by the court of Exchequer, the c the statutes is to be governed by long establi the case of *Langley* v. *Blackerby*(*a*) shews practice of more than a hundred years in plaintiff. This also appears from *Tidd* 8th ed., and *Archbold's Pr.* by *Chitty*, Moreover, *Tidd's Appendix*, p. 20., and C 5th ed., 586., give the form of a petition which is framed in the alternative, to be pr before or after the commencement of the seems no reason why the plaintiff should the privilege only before the commenc cause, for he may become insolvent during [*Tindal* C. J. If the plaintiff is admitted t *pauperis* before the action is commenced, may be disposed to settle the case; and it upon him that it may proceed nearly to through a long course of litigation, and plaintiff being admitted to sue as a pauper, his chance of costs.] It is not sufficien fendants to shew that some hardship may is to be remembered, that the admission o

(*a*) K. B. *H.* 12 *Geo.* 2. (1738), *Andrews*, 306 *Abr.* 262. in marg.

rmâ pauperis is not conclusive as to previous only as to those subsequent. With respect to , there is nothing in the 11 *Hen.* 7. *c.* 12. to the order must be made before the action is l. That act contemplates the suit in two , there is a provision as to the granting of and, 2dly, as to the suit being carried on free "after the said writ or writs be returned." of the statute are, "that every poor person which have or hereafter shall have cause of actions against any person or persons within shall have, by the discretion of the Chancellor m for the time being, writ or writs original, subpœna, according to the nature of their erefore nothing paying to your Highness for the same, nor to any person for the writing e writ or writs to be hereafter sued; and that hancellor for the time being shall assign such ks, which shall do and use the making and the same writs, to write the same ready to be l also learned counsel and attorneys for the out any reward taken therefore; and after the r writs be returned, if it be afore the king ch, the justices there shall assign to the same n or persons counsel learned, by their dis- hich shall give their counsels, nothing taking me; and likewise the justices shall appoint nd attorneys for the same poor person or d all other officers requisite and necessary to r the speed of the said suits to be had and ich shall do their duties without any reward counsels help and business in the same; and aw and order shall be observed and kept of its to be made afore the king's justices of his Place and barons of his Exchequer, and all ces in the courts of record where any suit

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shall be." The doubt arises upon the 23 which gives costs to the defendant upon verdict, and by sect. 2. provides, "that such poor person or persons being plainti in any action of debt, &c., which, at the co of their suits or actions, be admitted by the judge or judges where such suits or be pursued or taken, to have their process of charity without any money or fee pa same, and shall not be compelled to pay virtue and force of this statute, but shall punishment as by the discretion of the justi afore whom such suits shall depend, shal reasonable." It is submitted that this sta necessarily or even reasonably lead to t that an order to admit a plaintiff to sue *in f* must be made at the commencement of th is material to observe that the words, " mencement of their suits or actions," do the first time in the excepting, but in the of the statute. In *Blood* v. *Lee* (*a*), *Wilmo* from his manuscript notes, a case of *Oat Trin. T.* 22 *&* 23 *G.* 2., in which it was f whether a plaintiff could be admitted *in fo* after the commencement of the suit; but was resolved he might be so admitted at any action. *Blood* v. *Lee* was undoubtedly ad not upon this point, as was supposed by *Casey* v. *Tomlin*. In the case of *Blood* v. *L* of assumpsit commenced in the Palace Co moved by the defendant into the King's Ben *corpus*. The cause being at issue, and the having proceeded to trial in due time after i the defendant gave him notice of motio ment as in case of a nonsuit. Before the

(*a*) 3 *Wils.* 24.; and see 16 *Vin. Abr.* 262.

aintiff (being a poor man) applied to be ad-
d was admitted, to proceed in the suit *in*
peris. Afterwards, upon shewing cause, this
nade absolute, because the plaintiff or his at-
uld not undertake to pay the costs of that
to the court; whereupon judgment as in
nonsuit was entered. The plaintiff being then
xecution upon that judgment, it was moved
night be discharged out of custody on the
at a pauper was not liable to costs in that
appears, therefore, that in *Blood* v. *Lee* the
admitting a plaintiff to sue *in formâ pauperis*,
ite, was recognised and acted upon by the
he practice was also recognised by the court
uer in *Jones* v. *Peers* (*a*), where an order was
the commencement of the action, admitting
ff to prosecute his action *in formâ pauperis*;
plication by the defendant for security for
on of the costs previously incurred, was made
afterwards. The court, however, refused
ation, and gave a retrospective effect to the
Tindal C. J. In *Manning's Exchequer Practice*,
a rule of the 3 *G.* 1. is given, which provides
erson to whom the privilege of suing *in formâ*
s granted *pendente lite*, must give security to
sts incurred before admittance."]

Serjt. was then called upon by the court. It
at the statutes 11 *H.* 7. *c.* 12. and 23 *H.* 8.
contemplate the admission of the plaintiff to
nâ pauperis at the commencement of the suit.
admitted that the case of *Langley* v. *Blackerby*
rity the other way; but the recent cases of *Foss*
and *Lovewell* v. *Curtis* are in favour of the de-

(*a*) 1 *Cl. & Y.* 282. (*b*) 1st ed. vol. i.

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fendant; and although the court of Exche
v. *Tomlin*, declined to decide the point,
pressed a strong opinion against the practi
parties to sue *in formâ pauperis*, *pendente*
In *Comyns's Digest*, tit. *Formâ Pauperis*,
the court of Exchequer is referred to, wh
in 1717, the practice in that court was to
to sue *in formâ pauperis*, *pendente lite*.
said that if a plaintiff shall be dispaupere
afterwards be admitted to sue *in formâ p*
argument derived from the practice upon
entitled to no great weight. These are
ought to be strictly construed. If the
intended to grant the privilege at any
suit, they would have used expressions
have left no doubt upon the point.

TINDAL C. J. It appears to me that
to be decided upon the proper const
11 *H.* 7. *c.* 12. and 23 *H.* 8. *c.* 15.; beca
fell from the learned barons in *Casey* v.
that the court of Exchequer purposely
open for further consideration. The
11 *H.* 7. *c.* 12. is an enabling statute,
purpose of conferring a boon upon th
being "A mean to help and speed poor
suits." Therefore, unless the act in expr
necessary implication, requires that a pla
be admitted to sue *in formâ pauperis* b
mencement of his suit, we cannot impo
such condition. The statute contains no
There are no words to be found in it ind
tention that if a party becomes a paup
gress of his suit, he shall not be entitle
of the statute. With respect to the 23
does not appear to me to warrant the pos

ınt contends. That statute was the first to to the defendant where a plaintiff became a verdict passed against him; and foreseeing night arise in which plaintiffs might be ad-ue *in formâ pauperis*, the second section pro-t all and every such poor person or persons tiff or plaintiffs in any action of debt, &c. *he commencement of their suits or actions*, be by discretion of the judge or judges, where or actions shall be pursued or taken, to have ss and counsel of charity, without any money ng for the same, shall not be compelled to sts by virtue and force of this statute; but other punishment as by the discretion of the judge afore whom such suits shall depend, ought reasonable." The proper construction t may be to place persons suing *in formâ* a less favoured position where they are so *endente lite*; but it does not deprive them of of the former statute. With respect to the , there is *Langley* v. *Blackerby*, which seems tinct authority that a party may be admitted a pauper after the commencement of the ac-ere is also the case of *Brittain* v. *Grenville*. (*a*) defendant in ejectment, after issue joined, trial at bar on consenting to pay bar costs e nisi prius costs. Afterwards the lessor was o sue *in formâ pauperis*; which shews that at at least, the courts thought that a party might tted after action brought. And the rule in the r, already adverted to, that where a party is o sue *in formâ pauperis, pendente lite*, he shall dertaking that he will pay the costs already if he should become liable to them, shews

r. 1121.; *S. C.* 16 *Vin. Abr.* 262. pl. 15., by the name *lem. Webb* v. *Grenville.*

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that such was the general and recognised
after all, is the 11 *H.* 7. *c.* 12. any thing n
firmatory of the common law? In the
of the Serjeants' case by my brother *Ma*
note (*d*), a case is referred to that occ
15 *Ed.* 4., twenty years before the passin
from which it appears that at common l
would swear that he could not pay for
pleadings, the officer was bound to enter
and that in this court there was a "*pres*
poers." It seems to me that the proper
us to come to is, that this plaintiff w
be admitted to sue *in formâ pauperis*, per
that the rule must be discharged.

COLTMAN J. I am of the same opi
Racine and *Lovewell* v. *Curtis* were cas
costs; and the attention of the court of Ex
naturally drawn to the 23 *H.* 8. *c.* 12., u
tute, they came to a — somewhat hasty — c
a party was not entitled under the statute
to sue *in formâ pauperis* unless the applica
at the commencement of the suit. If the
my brother *Storks* be correct, the court,
Curtis, had no authority to give the plain
to be dispaupered or find security for co
both at the common law and at the statut
me that there is no ground for this applic

ERSKINE J. This is not a question ari
23 *H.* 8. *c.* 15. as to what would be the
plaintiff's being nonsuited, or of a verdict p
him; but whether the original order
plaintiff to sue *in formâ pauperis* after th
ment of the action, was a valid order or
we find that from an early period it has

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ıe courts to admit parties so to sue, *pendente* hat there was a rule of the court of Exchequer ır 1717, providing for such a case, we must r granted that the order was properly made, an be shewn that it is inconsistent either with on law or the statutes. With respect to the . 12., there is nothing in that statute incon- h the order, or tending to restrict the court tting parties to sue *in formâ pauperis*, after the ment of the action. The cases in the Ex- here the question arose, not upon the 11 *H.* 7., the 23 *H.* 8., are not necessarily inconsistent alidity of this order. It has been said that the Exchequer has expressed a strong opinion that ke the present could not be granted after the ment of the suit. But in *Casey* v. *Tomlin* appear to have thought that their former as not fully warranted, and they seem to ed to leave the point open for further con-

J. I also am of opinion that this rule should ged. The objection to the order of my bro- *an* is, that the court has no power to admit a e *in formâ pauperis, pendente lite*; and the ob- ought to be supported by the recent decisions rt of Exchequer. Those decisions, however, o the observations which have been already hat they were cases relating to costs, and that on of the court does not appear to have been the undoubted common law authority of the dmit parties to sue *in formâ pauperis*. The cited by my lord from the Serjeants' case t so early as the 15 *Ed.* 4. it was the es- practice to admit a party to sue *in formâ* and various instances are to be found in the

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books, of parties being so admitted after th
ment of the suit. The statute of the 11 H
in terms, extend to criminal proceedings;
been the practice of the court of Quee
admit parties to defend indictments *in fo*
which could only be done by virtue o
law authority. There is nothing in the
to limit the power of the court to admit
sue *in formâ pauperis* at the commenc
action. On the contrary, as the commo
had nothing to do with the original wri
returned, their power did not arise until
had been commenced, and, consequently, t
clearly meant to apply to persons who had
menced their actions. With respect to
c. 15., although the court of Exchequer
thought that it required the plaintiff to b
sue *in formâ pauperis* before the commenc
suit, it appears to me to have a bearing th
The first section enacts that "in tresp
statute 5 *Rich.* 2. (stat. 1. *c.* 8.) debt, cove
account, trespass on the case, or upon any
offence or wrong personal immediately su
done to the plaintiff, if the plaintiff, after
ance of the defendant, be nonsuited, or a
against him, the defendant shall have jud
cover his costs against the plaintiff, to be
taxed by the discretion of the judge or j
court where such action shall be commen
and shall have such process and executio
covery of the same against the plaintiff, a
should or might have had against the
case judgment had been given for the pl
by the second section it is provided that
person or persons being plaintiff or plai
action of debt &c. which at the commence

1841.

BRUNT v. WARDLE.

ctions be admitted, by discretion of the judge where such suits or actions shall be pursued to have their process and counsel, of charity, noney or fee paying for the same, shall not be d to pay any costs by virtue and force of that ut shall suffer other punishment, as by the dis- f the justices or judge afore whom such suits end shall be thought reasonable." This sec- s not say that every person who shall be so to sue *in formâ pauperis* shall be relieved from ; but that every person "which at the com- nt of their suits or actions" shall be admitted, e insertion of the words "at the commence- heir suits or actions" may be accounted for, their being unnecessarily inserted, or by their roduced for the purpose of depriving of the f that provision, such persons as might be ad- sue as paupers after the commencement of n — assuming that they might be so admitted *lite*. I think therefore the proper con- of this statute is, that parties may be ad- sue *in formâ pauperis* after the commencement action. Then we find that there is a rule in er, made in 1717, providing for what should when plaintiffs were admitted to sue *in formâ pendente lite*; and it is not denied that there established practice in favour of the authority ourts to admit plaintiffs so to sue. Upon what is that should be done, is a point which has not ed in this case.

lischarged, the costs to be costs in the cause. (*a*)

e the oath of office J. *Brown* upon his nt or election (un *J.* it islieu) to be pre- r the poor (called by

Lord *Brooke* preignotory, *prothonotary*, pur les pores, *Bro. Abr. Fees*, pl. 5., *Officer*, pl. 15.), in the Common Bench. *T.* 15 *E.* 4, fo. 26, pl. 2.

Nov. 19.

REID *v.* FORD.

Where the attesting witness to a warrant of attorney could not be found, the court allowed judgment to be entered up, on an affidavit that the defendant had acknowledged his liability, and also that the attestation was in the handwriting of the party whose name was subscribed as attesting witness.

SHEE Serjt. moved to enter up judgme warrant of attorney. It appeared tha of the attesting witness could not be obtain sworn that inquiries had been made for him given in the attestation, and at another p the party was referred by the father of th was likewise sworn that the defendant had his liability, and also that the attestation t of attorney was in the handwriting of the name was subscribed as the attesting witne

The learned Serjeant cited *Laing* v. *Ra* an affidavit stating that the defendant had the execution of an old warrant of attor to enable the plaintiff to enter up judgm sufficient to dispense with an affidavit from witness; and *Young* v. *Showler* (*b*), in whi cided that where the attesting witness was the solicitor who had prepared the warran the want of an affidavit from him was su plied by that of the solicitor verifying the clerk and the defendant, and stating tha had absconded and could not be found.

TINDAL C. J. Take your rule.

Rule

(*a*) 2 *B.* & *P.* 85. (*b*) 2 *Dowl.*

1841.

In re ANN LLOYD. *Nov.* 22.

The mother of an illegitimate child of between eleven and twelve years of age obtained an *habeas corpus* directed to putative father, to bring her up before the court. On the child being produced, in obedience to the writ, the court declared that she might use her own discretion as to where she would go, and the child being unwilling to go with her mother, the court would not permit the mother to take her by force.

BEAS CORPUS having been issued on the ication of *Ann Lloyd Bowser*, the wife of *Samuel* of *Pembrey*, in the county of *Carmarthen* (but m she was then living separate), directed to a *d*, commanding him to bring up the body of *d*, an infant between eleven and twelve years e natural child of the said Mr. *Lloyd* and *Ann wser*, born previously to her marriage,

ley Serjt. now on behalf of Mr. *Lloyd*, produced in obedience to the writ, leaving the court to her as they might think proper.

Serjt. in support of the claim of the mother. ther does not interfere, the question is, whether is to be allowed to choose for herself. By the law, 4 & 5 *W.* 4. *c.* 76. *s.* 71., the burden of g the child is thrown on the mother. [*Tin-* As this child was born previously to the pass- at statute, it does not apply. *Maule* J. The nth section enacts, "that every man who from the passing of this act, shall marry a woman child or children at the time of such mar- ether such child or children be legitimate or te, shall be liable to maintain such child or as a part of his family, and shall be charge- all relief, or the cost price thereof, granted account of, such child or children, until such children shall respectively attain the age of or until the death of the mother of such children." According to that clause, the ap- husband would appear to be the fit person

1841.

In re LLOYD.

to have the custody of the child.] If
court by a stranger, the detention of the
considered as unjustifiable as against the
the father, then he brings her ready to
as the court may direct. It is not comp
parties bringing the child to set up any
dilection on her part. [*Tindal* C. J. If
teen she clearly might elect for herself. *C*
what legal ground do you put the mother'
custody of this child?] She is to be co
derelict child, being abandoned by her fath
Suppose she had been brought up on *ha*
the instance of a stranger, could the court
be given up to him? How does the moth
gitimate child differ from a stranger? *T*
this had been a young child I should feel
for the case would then fall within *The*
kins (*a*), where the court returned the chil
tody of the mother. But here the child
herself. Suppose she were to say that s
go with her mother, we could not force h
There is no difference between an infan
[*Tindal* C. J. There is this difference, one
plain of illegal restraint, but the other may
that the court has authority to deliver her to
The King v. *Soper* (*b*), *Rex* v. *Moseley*. (*c*)
Those cases, and particularly the latter,
the ground that the putative father had obt
sion of the children by force or fraud, a
infants of tender age. *Maule* J. referre
Delaval. (*d*)] *Ex parte Skinner* (*e*), *Ex p*
lan (*g*), and *The King* v. *Greenhill*. (*h*)

(*a*) 7 *East*, 579.
(*b*) 5 *T. R.* 278.
(*c*) 5 *East*, 224. n.
(*d*) 3 *Burr.* 1434., 1 *Will. Bl.* 410. 439.
(*e*) 9 *Moore*,
(*g*) 1 *Dowl.*
(*h*) 4 *A. & E*
& Mann. 244.

1841.

In re LLOYD.

d *Denman* says, " When an infant is brought e court by *habeas corpus*, if he be of an age to a choice, the court leaves him to elect where o." This child, however, cannot be considered agent in choosing with whom she will live.

L C. J. This is a case of some difficulty, and ot help feeling distressed at being obliged to a decision upon it. The writ of *habeas corpus* obtained by the mother of an illegitimate child, urpose of bringing her up from the custody of ith whom she had been placed by her putative The child is now in court in obedience to the appears, as she has been sworn to be, between nd twelve years old. Had she been under rs of age, the court would have said that she ercise no discretion; but she is old enough to r herself, and therefore we do not feel called xercise a discretion for her. If she is willing h her mother, she may, but if she does so it ner own free will, for no force shall be used.

rdship then asked the child if she would go mother, but she expressed a strong dis- n to do so. His lordship then told her that at liberty to go where she would; whereupon he court with the female who had accompanied e. Upon quitting the court, the mother at- to take forcible possession of the child. This de known to the Chief Justice, one of the offi- e court was sent with her for her protection.

Nov. 24.

DAVISON *v.* GAUNTLETT and Another.

A judge's order was obtained to enable an arbitrator to enlarge the time for making his award to the 2d of *November* 1841, "or to such other or ulterior day, as the said arbitrator should ultimately appoint and signify in writing under his hand, *to be indorsed on the said order of reference.*" The arbitrator having enlarged the time to the 2d of *November* 1841, made his award on the 11th of *October*.

Held, that it was not necessary to indorse such enlargement on the order of reference.

SIR *T. WILDE* Serjt. shewed cause against a rule obtained by *Channell* Serjt. to set aside an award.

By an order of reference, dated the 16th of *May* 1839, the cause and all the matters in difference, had been referred to a barrister, who was to make his award on or before the 2d of *November* then next, or on or before such other or ulterior day as he should by writing under his hand appoint.

The arbitrator having neglected to enlarge the time for making his award on or before the 2d of *November* 1839, the parties consented to a judge's order of the 12th of *May* 1840, by which it was provided that the arbitrator should be at liberty to enlarge the time, *nunc pro tunc*, until the first day of the ensuing *Michaelmas* term, which was done.

On the 23d of *October* 1840, another order was obtained, empowering the arbitrator to enlarge the time to the 2d of *November* 1841, "or to such other or ulterior day as the said arbitrator should ultimately appoint, and signify by writing under his hand, to be indorsed on the said order of reference." The arbitrator enlarged the time to the 2d of *November* 1841, and made his award on the 11th of the preceding *October*.

The objection is, that the time for making the award was not duly enlarged under the order of the 23d of *October* 1840, such enlargement not having been endorsed on the order of reference. It is submitted that it was not necessary to indorse the enlargement of the time to the 2d of *November* 1841, on the order of reference; for that was only required to be done in case the time was enlarged to an ulterior day.

1841.

CLEMENT v. WEAVER.

This was an action of debt brought to recover 3*l.* 6*s.*, a balance remaining due to the plaintiff upon the sale of two pigs to the defendant. A declaration was filed on the 3d of *August*, without any particulars of demand, as required by the rule of *T.* 1 *W.* 4. (*a*) Notice of declaration was served on the defendant on the 4th of *August*. On the 23d of *August* the defendant made an affidavit that no particulars had been delivered. On the 18th of *October* the defendant took out a summons, in which, in addition to the common printed form (which requires particulars of demand and stays proceedings in the meantime), the plaintiff was called upon to pay the costs of and occasioned by the application. This summons, and another of like tenor taken out on the 21st, were left at the office of the plaintiff's attorney, but were not noticed by him, he and his clerk being both absent from town.

On the 23d of *October* the order in question was made by *Wightman* J. in the terms of the summons. Under this order the costs were taxed, on the 26th of *October*, at 3*l.* 9*s.* 6*d.*; and on the 9th of *November* the order was made a rule of court; whereupon a *fi. fa.* issued, under which the plaintiff's goods were taken in execution.

Manning Serjt., for the defendant, took a preliminary objection to the rule which had been obtained, that as the order of the learned judge had been made a rule of court, it was now too late to move to set aside the order, and that the application was nugatory, as it would leave the rule of court unimpeached.

Bompas Serjt., *contrà*. A motion to set aside a judge's order cannot regularly be made before that order has

(*a*) *Vide* 7 *Bingh.* 783., 5 *M. & P.* 815., 2 *B. & Ad.* 788., 1 *Tyrwh.* 521., 1 *Cro. & J.* 470.

1841.

Nov. 24.

DAVISON *v.* GAUNTLETT and A

A judge's order was obtained to enable an arbitrator to enlarge the time for making his award to the 2d of *November* 1841, "or to such other or ulterior day, as the said arbitrator should ultimately appoint and signify in writing under his hand, *to be indorsed on the said order of reference.*" The arbitrator having enlarged the time to the 2d of *November* 1841, made his award on the 11th of *October*.

Held, that it was not necessary to indorse such enlargement on the order of reference.

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The objection is, that the time for maki was not duly enlarged under the order o *October* 1840, such enlargement not hav dorsed on the order of reference. It is s it was not necessary to indorse the enlarg time to the 2d of *November* 1841, on the o ence; for that was only required to be do time was enlarged to an ulterior day.

1841.

DAVISON v. GAUNTLETT.

ll Serjt., in support of the rule. The true on of the last order is, that any enlargement ıe should be indorsed on the order of refer- ɔrding to the usual practice. There is no y any distinction should be made between an nt to the 2d of *November* and one to an ulte-

. C. J. Although the order is rather oddly does not require the enlargement of the time g the award to the 2d of *November* 1841, to be ɔn the order. The indorsement is required any enlargement to a day *beyond* that date.

Rule discharged, with costs.

LLIAM CLEMENT *v.* JOHN WEAVER.

Nov. 24.

AS Serjt., in this term, obtained a rule calling the defendant to shew cause why so much of nade by *Wightman* J., dated the 23d of *October* ɔected the payment of the costs by the plain- ll subsequent proceedings *had thereon*, should t aside. The rule was moved for upon an nade by the plaintiff's attorney, which con- following statements: —

A judge at chambers may engraft upon an order requiring a plaintiff to deliver particulars of demand under *R. T.* 1. *W.* 4., a direction to the

defendant to pay the costs of the application. (*a*) *Per Coltman* J. who considers himself aggrieved by a judge's order, may move to set side, wholly or in part, before it is made a rule of court.

order is made a rule of court, a motion to set aside the order and all had thereon, without specifically mentioning the rule of court, is

comes too late to set aside a judge's order who has lain by and al- pponent, without objection, to take several steps in the cause conse- such order.

de Collins v. *Aron*, 4 *New Ca.* 233., 5 *Scott*, 555.

1841.

CLEMENT v. WEAVER.

This was an action of debt brought to r
a balance remaining due to the plaintiff up
two pigs to the defendant. A declaration
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were left at the office of the plaintiff's atto
not noticed by him, he and his clerk being
from town.

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execution.

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objection to the rule which had been obt
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of court, it was now too late to move to
order, and that the application was nugato
leave the rule of court unimpeached.

Bompas Serjt., *contrà*. A motion to set a
order cannot regularly be made before t

(*a*) *Vide* 7 *Bingh.* 783., 5 *M. & P.* 815., 2
1 *Tyrwh.* 521., 1 *Cro. & J.* 470.

1841.

CLEMENT v. WEAVER.

e a rule of court. [*Tindal* C. J. It is com- ıe.] At all events, the plaintiff is entitled to ɔrder rescinded, as a step towards the setting ıe rule.

. C. J. The application should have been to he rule of court, in which the judge's order is If the order is rescinded, the rule of court in. The court, however, is unwilling to dis- e present rule upon that ground; we wish to ase upon the merits.

g Serjt. then, without waiving the objection n of the rule, shewed cause upon an affidavit fendant's agent, adding to the plaintiff's facts, as informed and believed that the defendant od defence upon the merits; that notice of e costs had been served on *Hope*, the plain- ney, with notice of the taxation of the costs 6th, when he not attending, the costs were is absence; that from the difficulty of meeting plaintiff's attorney, the order had been served plaintiff in the country, and payment of the emanded; that at the request of the clerk of ff's attorney, the defendant's agent forebore, eturn of the affidavit of service and demand, he order a rule of court; and though he gave the 4th, that unless the costs were paid in the the 5th, the order would be made a rule of t step was not taken until the 9th; that, on the rule was served on the defendant's at- h an appointment thereon; that, on the 11th, of the rule were taxed, amounting with those er to 8*l.* (*a*); that *Hope*, the plaintiff's attorney,

o the mode of ob- costs of making a judge's order a rule of court, see the decision of the judges

1841.

CLEMENT v. WEAVER.

by for an unreasonable time after an or
obtained and served, and after that order h
a rule of court, I think he cannot come to
set the order aside. Here, the order was
served on the 23d of *October*. An ap
taxing the costs upon the rule was left a
the plaintiff's attorney on the 26th, and,
notice of a second appointment was person
him. On the 4th of *November* notice w
unless the costs were paid on the follo
order would be made a rule of court. T
however, in fact, waited till the 9th before
step, and it was not till the 13th that the
here to set it aside. By this dilatory c
plaintiff the defendant has been led to
steps, which were necessarily attended
The order cannot therefore now be questi

COLTMAN J. I do not agree in the p
vanced by my brother *Bompas*, that it
petent to the learned judge to make this or
contrary, I think he had the power.
T. 1 *W.* 4., in terms, merely deprives the
neglects to deliver particulars of demand,
obtaining the order. It contains nothin
the general authority of a judge at chamb
costs. (*a*) The ground upon which this ru
of, however, is, that the plaintiff has b
laches. Receiving notice on the 4th that
is about to take steps which will cause ex
by till the 13th, when that expense has be

ERSKINE J. was at chambers.

MAULE J. concurred.

Rule discharge

(*a*) *Vide antè*, 554. (*a*).

1841.

WALKER *v.* NEEDHAM.

Nov. 4. 24.

NUE for a boat, which was stated in the laration to be of the value of 20*l.* The cause tried before the undersheriff of *Middlesex* in , when a verdict was found for the plaintiff, 8*l.*

ell Serjt., on a former day in this term, had a rule nisi to set aside the writ of trial and the ngs thereon (*a*), upon the ground that detinue an action which could be tried before the nder the 3 & 4 *W.* 4. *c.* 42. *s.* 17.

s Serjt. now appeared to shew cause, when a ry objection was raised by *Channell* Serjt. to g heard, that the plaintiff had only taken an y of the affidavit on which the rule was granted, f the undersheriff's notes.

L C. J. A copy must be taken of the notes, and take it now.

Detinue, where the article sought to be recovered is stated to be of the value of 20*l.*, may be tried before the sheriff under the 3 & 4 *W.* 4. *c.* 42. *s.* 17.

In order to raise the question whether a case is triable before the sheriff, the proper motion is not for a new trial, but to set aside the writ of trial and the proceedings thereon.

otion for a new trial in a cause which has been tried before the sheriff, shewing cause must be provided not only with an office copy of the n which the rule has been obtained, but also of the sheriff's notes. whether a defendant, by consenting to a judge's order, directing a writ r the trial of the cause before the sheriff, waives any objection to the risdiction in the sheriff.

e rule was drawn up trial, and on cause rn, an objection was ich the court con- be well founded, that n should have been, e the writ of trial, as there could not be a new trial if the objection for want of jurisdiction was valid. It turned out, however, that the rule was so drawn up through a mistake of the officer, upon which the point was abandoned.

1841.

WALKER v. NEEDHAM.

point was in principle decided by the chequer in *Wilson* v. *Thorpe*. (*a*) There, a cause before the under-sheriff, under question, a verdict was taken, by consent, tiffs subject to a reference, both parties c the arbitrator should have power to dire be entered for either party. The court, aside the verdict and judgment, though r on the ground that the sheriff was bound to and could not delegate his authority to here, this court could not delegate its a sheriff, unless the case was clearly within withstanding the consent of the parties. The same argument will apply to sendi of court for a barrister to certify.] Th notices the act of the arbitrator, but treats the court. The next question is, wheth the objection cannot be waived, this is a c within the 3 & 4 *W.* 4. *c.* 42. *s.* 17. *Pr* and *Allen* v. *Pink* are in some degree con more recent decisions in *Jacquot* v. *Boura* v. *Wilcock*. In *Watson* v. *Abbott* (*b*) it was statute does not apply to torts, but only pecuniary demands. This is, in substance, the gist of the action being the detainer *Hewitt*. (*c*) It is submitted that the act where a debt, or a demand in the nature to be recovered. In detinue, however, object is to recover the article; and altho ment is in the alternative, still the action i for a mere pecuniary demand. *Keilwey*, *Entries*, 202., *Tidd's Forms*, 389. (*d*) [*M* *amicus curiæ*, suggested that a *distringas*

(*a*) 6 *M.* & *W.* 721.
(*b*) 2 *C.* & *J.* 150., 2 *Dowl. P. C.* 215.
(*c*) 1 *Tyrw* *J.* 565.
(*d*) 4th edit

1841.

WALKER v. NEEDHAM.

ıe on the judgment in the action. (*a*) *Maule* J. e is no process by which the defendant can be l to give up the article if he chooses to pay the assessed for its detention.] Although the de- annot be forced to give up the article, still the bject in bringing the action is to recover the hattel. (*b*) Detinue is, in many respects, a ction than trover.

L C. J. This is, in substance, a motion in arrest ent; and we think that we ought not to be on to arrest the judgment where the question nicety and difficulty, and appears on the re- till less should we be so called upon, where ndant who now complains that the writ has roperly issued, was himself a consenting party se going before the sheriff. It may not be , therefore, to give any opinion upon the main that has been argued before us. But as the s arisen, I think, as at present advised, that is within the 3 & 4 *W.* 4. *c.* 42. *s.* 17. The that section are not limited to actions of debt, d to demands of the like kind and character. falls within that class of actions called actions ct; and the whole course of the proceedings at it is rather matter of contract than of tort. ctice also of joining debt and detinue proves are actions of the like nature. (*c*) The old form debt was, in the debet and detinet, except when against an executor in respect of a demand

e Townsend's Book of , 82, &c.

ere whether the plain- t, as well as the gar- oceed upon the judg- recover the chattel distress infinite. *M.* fo. 39, pl. 15.; *P.* 21 *H.* 6, fo. 36, pl. 2.; *H.* 39 *H.* 6, fo. 37, pl. 1.

(*c*) Detinue *sur bailment*, which is *ex contractu*, may be joined with detinue *sur trover*, which is not. *Vide post*, 564. (*c*).

1841.

WALKER v. NEEDHAM.

due from his testator, when it was in the det
It seems to me, therefore, that as the v
chattel sought to be recovered may be ind
writ of summons, and as the case is virtua
of contract, and if not, as near to it as n
within the statute, and may be sent for tri
sheriff. But if the parties are dissatisfied wi
ment, as the error is upon the record, they
if they think proper, before another tribuna

COLTMAN J. I also am of opinion tha
action for a demand not exceeding 20*l.*, an
triable before the sheriff. The plaintiff ca
more than the sum indorsed on the writ,
in the declaration. It is said that he may h
also for the detention of the chattel; but tha
in debt also, where the plaintiff recovers d
mages for its detention; and yet an action o
the sum indorsed on the writ is 20*l.*, ma
trial before the sheriff under this statute.
spect, therefore, detinue stands on the sam
debt. If we are wrong the defendant will no
his remedy, the error being upon the reco
error upon the record, I am inclined to th
consent of the parties can waive it. But I g
sent judgment upon the ground, that by anal
this is such an action as may be tried before

ERSKINE J. In this case the plaintiff seek
a chattel which he values at 20*l.*; he ca
only recover the chattel itself, or the value
the limit which he has prescribed in his
and unless it clearly appears that the case i
the statute, we ought not to set the writ

(*a*) So, where the action of debt is brought, n
but for goods.

1841.

WALKER v. NEEDHAM.

of the act extends to actions for a debt or de- which the sum sought to be recovered does ed 20*l.*; and this being a demand in which the may be indorsed upon the writ, and the action e in which the value of the chattel may be re- as well as the chattel itself, I can see no hy it should not be tried before the sheriff like of debt, for it is just as simple. If it had been d, at the time that the writ of trial was applied any difficult question of law or of fact would judge would not have made the order. But t only did the defendant make no objection, consenting to the writ, he has been the means of being tried before the sheriff. He may resort t of error if he thinks that the action is not e statute.

E J. I also think that this rule should be dis- I doubt very much whether the consent given lefendant in this case to its being tried before iff, is such a consent as the court should take in discussing a motion like the present, which ect, for an arrest of judgment. It appears to ever, that this is an action, for a demand not g 20*l.*, within the meaning of the statute. The of the act is, that the sheriff shall try small on which questions of a simple nature alone are arise; and his power is restricted to cases of by the act saying, first, that actions for any demand in which the sum sought to be reco- all not exceed 20*l.*, may be tried before him; ondly, by its being provided that the judge the order shall be satisfied that no difficult of law or of fact is likely to arise. It has been the demand referred to in the act must be a in the nature of a debt. This action is as

1841.

WALKER v. NEEDHAM.

nearly an action of the nature of debt as c
for in detinue the plaintiff can only recover
the article, and cannot, by any means, obtai
of the chattel itself. Detinue is so much li
of a debt, that the two may be joined. I
not only for money, but for specific things
Earl of Falmouth v. *George* (*a*), where it w
debt lay for the toll of fish in specie; and if th
also been for certain specific fish, there can
that detinue might there have been joined w
Lord *Coke* says, speaking of rents, *Co. Litt.*
case an election be given of two several th
he which is the first agent, and which ough
first act, shall have the election. As if a m
a rent of 20*s.* or a robe, to one and to hi
grantor shall have the election; for he is the
by payment of the one or delivery of the oth

I think that this statute is one which ough
a liberal construction, and that detinue cl
within its provisions.

Rule dis

(*a*) 5 *Bingh.* 286. From another report of the same case, 2 *M. & P.* 457., it appears to have been held, not merely that debt in the detinet lies for so many fish, but that a general *indebitatus* (the modern inartificial form of declaring in debt on simple contract, borrowed from *indebitatus assumpsit*, instead of stating, as formerly, the true contract or contracts) may be maintained. *Quære tamen.*

(*b*) The action of debt in the detinet for goods in quantity or *in specie* (and which may therefore, in a certain sense, be called *specific* goods), se
termediate betwe
nary action of de
and the action of
is always for *spec*

(*c*) "If the pl
but to the damag
more damages ma
him *against the g*
he does not *coun*
garnishee." *M.*
pl. 11. In detin
there can be no g
interpleader. *Qu*
it may be joined
detinue *sur bailm*

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ILLING *v.* DEVAUX and Another. *Nov.* 20.

IPSIT, to recover the amount of a bill of exge, with interest and expenses thereon.

st count of the declaration was upon the bill ge before referred to, which was therein alhave been drawn by one *M. T. Morsing*, at on the 21st of *August* 1840, upon, and to directed to, the defendants under the firm of *Devaux* and Co., for 225*l.* sterling, payable lays after date, to the order of the plaintiff; hat the defendants, after the bill became due, 5th of *September*, accepted the bill, but had he same. The second count was for money received, and the third, upon an account The defendants traversed the acceptance of in the first count mentioned, and, to the nd third counts, pleaded non assumpserunt. reon.

llowing case was, under a judge's order, purthe statute, 3 & 4 *W.* 4. *c.* 42., stated for the f the court.

A merchant abroad, on the 21st of *August* 1840, (among other bills), drew upon the defendants, his *London* correspondents, a bill for 225*l.* at eighteen days' date, payable to the plaintiff. The defendants refused to accept the bill, and on its being presented for payment on the 11th of *September*, refused to pay it. On the 13th the drawer died

circumstances. On the 15th, the defendants, not being aware of his solvency, wrote to him a letter containing this passage, "Respecting on us, we have to advise that we have paid and are prepared to pay ng," mentioning, among other bills, the one in question. In a postadded, "We have just been informed that the holders of the bill 225*l.*, had returned it to you. This they had no right to do, as we y explained to you; they were bound to keep it till the following The said bill, we are almost sure, was presented again on *Saturday* fore we cannot conceive how it can have been sent back before this ought to require proof that this bill has been returned by *Friday*'s wise the charge made thereon, cannot be demanded of you."

at the letter contained an absolute promise to pay, which amounted to eptance of the bill, and that the effect of the letter was not destroyed by the postscript.

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The bill of exchange described in the was drawn by *Morsing*, a merchant at *Sto* the defendants, who are merchants in *Lond* of the plaintiff, who is also a merchant The plaintiff indorsed the bill to third par presented by the holder to the defendants fo on the 1st of *September* 1840, but refused, a tested for non-acceptance. On the 8th 1840, the defendants wrote to *Morsing* as "We confirm our respects of the 4th in now in possession of your favour of the In answer thereto we can only say that tremely sorry to be under the necessity to immediate acceptance of all your drafts; bu have been in a situation to prevent any bil turned." On the 11th of *September* 184 which the bill in question had to run bein was presented by the holder to the defend ment, but refused; and it was thereupon p returned to *Stockholm*, where it was take plaintiff, the first indorser, and he was comp 4*l.* 4*s.* 4*d.* for charges, in addition to the amou

On the 11th of *September* 1840, being th that the bill in question was presented for, payment, the defendants wrote to *Morsing*, firm our respects of the 8th instant."

On the 13th of *September* 1840, *Morsing*, died insolvent at *Stockholm*. Of this event ants were not aware until after the writing next mentioned.

On the 15th of *September* 1840 the defen a letter addressed to *Morsing*, of which the a copy: —

"Sir, — Referring to the letter we had of writing you the —— instant, we have knowledge the receipt of your's of the 4th

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ched us *viâ Hamburgh* late this afternoon, ad- of your draft on us for 300*l.* at fourteen days der *I. Paton* and Co. We likewise note that of 300*l.* dated 11th *August*, due 8th instant, ad not appeared when due, has been returned we therefore annul the same. The same mail due) brings us advice that all your remittances oted except the two bills of *Banco Marks*, 7200 0, on *Lutteroth* and Co., who requested the said ht be presented again in a fortnight.

pecting your drafts on us, we have to advise *have paid, and are prepared to pay, the fol-*

—

£397 due 15th instant.
200 „ „ „
100 „ 11th „
503 „ 15th „
425 „ 11th „
225 „ „ „

"*C. Devaux* and Co."

.— We have just been informed that the of the bill above for 225*l.* had returned it to his they had no right to do; as we have already d to you, they were bound to keep it till the g post day. The said bill, we are almost sure, esented again on *Saturday* last; therefore we conceive how it can have been sent back before . You ought to require proof that this bill was by *Friday*'s mail, otherwise the charges made cannot be demanded of you."

ill for 225*l.* referred to in the said letter and ot is the bill in question in this cause. This as shewn, and a notarial copy thereof was fur- by *Morsing*'s administrator, to the plaintiff, by he bill was, on the —— *October* 1840, presented lefendants, and payment demanded, but refused.

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Under these circumstances the present acti
brought.

By the law of *Sweden*, the payment of a
bill cannot be enforced in that country
drawer or indorser thereof without produ
original bill, together with the protest.

If the court shall be of opinion that the
15th of *September* 1840, above stated, c
valid acceptance of the bill in question, o
the circumstances stated, the defendant
upon the pleadings, to pay to the plaintif
for which the bill was drawn, judgment is
for the plaintiff, by confession, for such
court shall think fit, besides costs of suit.
court shall be of opinion that the letter di
to such an acceptance, and that the circum
do not create a liability on the part of the
upon the pleadings, to pay the amount f
bill was drawn, then a judgment of *nolle*
be entered (*a*) in this action.

Channell Serjt., for the plaintiff. It is su
there was a good and valid acceptance o
question. The 1 & 2 *G.* 4. *c.* 78. *s.* 2., wh
the acceptance of an *inland* bill of exchang
writing on such bill," does not apply to
and, consequently, an acceptance of a fore
still be by letter. The cases that shew the
15th of *September* 1840 was not the less a
because it was written after the bill arrived
Jackson v. *Pigott* (*b*); *Mutford* v. *Walcot* (*c*)
Peart. (*d*) Neither is it any objection th

(*a*) *i. e.* a *nolle prosequi* is to be entered, and judgment thereon.

(*b*) 1 *Lord Raym.* 364., 12 *Mod.* 212.

(*c*) 1 *Lord*
Mitford v. *Wa*
129., 12 *Mod.* 4

(*d*) 7 *M.* &
Dowl. P. C. 291

ommunicated to the plaintiff until after the bill
lue, or that it had once been refused accept-
his case clearly falls within *Wynne* v. *Raikes* (*a*),
etter from the drawees of a bill in *England* to
er in *America*, stating that "their prospect of
eing so much improved, they shall *accept or*
pay the bill," was held to be an acceptance in
ough the drawees had before refused to accept
hen presented for acceptance by the holder,
ded in *England*, and again after the writing
er, refused payment of it when presented for
; and although such letter written before was
ed by the drawer in *America* until after the
become due. There, the words were in the
e; here, the terms are stronger, "we have paid
repared to pay." (*b*) [*Maule* J. The difficulty
e drawer was dead when the letter was written.
the letter had remained in the counting-house
riters?] On *Morsing*'s death, the letter was
by his administrator, who exhibited it to the
[*Maule* J. There was a sufficient exhibition
ter by the administrator supposing *Morsing* to
ived it; but the difficulty is, that he did not
. *Fairlie* v. *Herring* (*c*) is a strong case of an
e by parol.] It would lead to mischievous
nces, if it was held that the administrator did
ll purposes, stand in the place of the drawer.
Cock (*d*) is also in point.

Wilde Serjt. (with whom was *Barstow*), for the
ts. The letter of the 15th of *September* did
r the circumstances, amount to an acceptance

East, 514., 2 *J. P.*

" We are prepared
se not already paid."

(*c*) 3 *Bingh.* 625., 11 *B. Moore*, 520.

(*d*) 4 *East*, 57.

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of the bill. Although not decisive, it is n
terial fact that such letter was written a
arrived at maturity, and after *Morsing*, the
died insolvent. It has always been held
mise to accept must be expressed in cle
equivocal terms; *Johnson* v. *Collings* (*a*);
Heath (*b*); *Rees* v. *Warwick*. (*c*) It is said
Lex Mercatoria, 454., pl. 16., that "if the
a bill of exchange) hath neglected to deman
before the drawer's failure, and the person
is directed hath advice thereof, he cannot b
to accept the draft, though previous to th
of the drawer's misfortune he had acquain
his intention to honour the bill, and eve
confesses that he should have done it, had
sented and the acceptance demanded befor
of the drawer's failure had reached him." (*d*
The writer must be speaking of a promise
not amount to an acceptance; for he ap
sume that there has been no acceptance.]
clearly is, that that which amounts to an a
revocable if an alteration takes place in
stances of the drawee before the drawer h
cated with the holder. The letter in q
written under the mistaken supposition that
not been returned to *Stockholm*, and also tha
was living. It cannot be doubted that the
the defendant was altered by *Morsing*'s dea
the letter could not be made use of by any
Even admitting that the body of the letter
an acceptance, the postscript shews clea
defendants did not mean to pay the bill the
expected it to be paid by the drawer.
been presented both for acceptance and f

(*a*) 1 *East*, 98.
(*b*) 4 *M. & S.* 303.
(*c*) 2 *B. & A*
(*d*) See 2 *Ma*

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been refused, and was returned to *Morsing*. defendants write this letter, the postscript of rly intimates that he is the party who must to for the amount. It cannot be said that ould, under these circumstances, have main- action upon the promise said to be contained ter; and, if he could not maintain an action, be supported by any one claiming under him. bill is accepted in the usual mode, it is pre- be for value; but where it is not so accepted, presumption arises. Here, it appears by the dence that the bill was not drawn for value, ectation that the drawees would be in funds, have sufficient confidence in the drawer to s draft. Looking at the body of the letter in with the postscript, it is submitted that there omise either to accept or to pay the bill.

l Serjt., in reply, was stopped by the court.

C. J. There are two grounds on which the s contend they are not liable in respect of the uestion; first, they say that their letter of f *September* 1840 did not, under the circum- tending it, amount to a promise to accept or e bill; and, secondly, whatever might be the he letter itself, yet, taken in connection with ript, it did not operate as an acceptance of the th respect to the first point, I am not aware of ple of law by which, upon the death of the the bill, the right and liabilities of the parties ere at all varied. Supposing it to be estab- it has been by the authorities, that an accept- the bill is due is binding, and that a foreign be accepted by letter, the main question for ideration is, whether, taking the letter and

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postscript together, they amount to an ac
is clear that when the bill was drawn, the
no funds in the hands of the drawees;
letter of the 8th of *September*, they appear
accept by reason of the want of funds.
however, of the letter of the 15th of *Sept*
fendants seem to be in possession of remitt
the bills enumerated in that letter; for th
conclusion: "Respecting your drafts on u
advise that we have paid, and are prepare
following;" and a list is added containin
question. They leave it uncertain which
and which they are prepared to pay; but
distinctly told that the whole are provide
the letter had stopped there, no doubt cou
entertained, as it contains a clear and une
mise. But it is said that the letter is qu
postscript, which is as follows: "We ha
informed that the holders of the bill above
returned it to you. This they had no rig
we have already explained to you they w
keep it till the following post day. The
are almost sure, was presented again on
therefore we cannot conceive how it can ha
back before this day. You ought to requi
this bill has been returned by *Friday*'s m
the charges made therein cannot be deman
It is not possible to give to this postscri
ascribed to it by the defendants. The wri
dently alive to the fact that the bill had b
to *Stockholm*; but they do not retract the
in the letter to appropriate the remittance
the payment of this and the other bills.
me that the only object of the postscript
drawer on his guard against some impro
which they conceive may be made upon hi

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ter in connection with the postscript, it amounts
ise to pay the bill in question, which promise,
of law, constitutes a sufficient acceptance.

AN J. The body of the letter of the 15th of
amounts, in my opinion, to an unqualified ac-
of the bill in question; and I do not think that
ptance is, in any degree, retracted or affected
stscript. Two circumstances have been relied
ing this case out of the ordinary rule. The
insolvency of *Morsing*, of which the defendants
aware at the time that they made the promise;
sage has been cited from *Beawes's Lex Mer-*
om which an inference has been sought to be
at the insolvency of the drawer cancels an
e like the present, or, at least, makes it re-
I am not aware of any authority for such a
and the conclusion attempted to be deduced
passage appears to me to be a misapprehension
aning of the writer, who is evidently referring,
n suggested by my brother *Maule*, to such a
s does not amount to an acceptance. The
umstance which has been relied on is, that
the drawer, was dead at the time that the
written to him, and therefore that it is to be
l as mere waste paper. Possibly that might
ase were its effects confined to the parties
s. But here, the bill had been put in circula-
the collateral promise, when given, operated
enefit, not only of the drawer, but of every
y connected with the bill; and in this respect
o difference, that I can see, between such an
e as this by letter and an acceptance by
the face of the bill, which, there can be no
uld not have been affected by the death of the
fore it was written.

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ERSKINE J., having heard only a part ment, merely expressed his concurrence fallen from the Chief Justice and Mr. Just

MAULE J. I also am of opinion that t entitled to judgment. The letter of the *tember* contains an unqualified promise t in question; and such promise, made with foreign bill, as this is, constitutes a good ceptance. The defendants say in their le are prepared to pay the bill; apparently remittances which they had received fro In my opinion the letter amounts to as cle a promise to pay as well could be made. that the letter was written under a misap to facts, and before the defendants knew th been returned. But although the letter its before the information reached them, shews that it was not *sent* until they were circumstance; and consequently the letter with full knowledge of the bill having to the drawer at *Stockholm*. The defe made an express promise in the letter, if to revoke that promise in the postscrip have done so in clear and explicit term ever enough to say that there is nothing script to revoke the unqualified promise c letter; and, taking the letter to have pass there can be no doubt as to its constituting But it has been said that if the defendant that *Morsing* was either dead or dying at would not have made such a promise. S were so, the argument would apply to ev transaction. When a man enters into a does not intend to be bound in the event of the party with whom he contracts, he sh

stipulation into the contract. Here, the letter s for the benefit of *Morsing*'s estate; for his death ot vary the rights and liabilities of third parties.

Judgment for the plaintiff.

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BILLING v. DEVAUX.

CASSIDY *v.* STEUART.

Nov. 22.

LY in this term *Spankie* Serjt. obtained a rule *si* for an attachment against *the sheriff* of *Mid-* for an insufficient return to a *ca. sa.* issued against endant.

A party served with a rule calling upon him to shew cause, is not entitled to his costs of appearing upon the rule, if he has no cause to shew.

return was as follows: — "By virtue of this writ directed, I did, on the 23d day of *July* last, take tain the within named *Robert Steuart* in my cus- nd had him in my custody under the said writ, he said *Robert Steuart* was discharged out of my by a certain order made by the Right Honour- Mr. Justice *Erskine* (*a*), the said *Robert Steuart* privileged from arrest; and the said *Robert Steuart* ot, since the time I so discharged him out of my , hitherto (omitting the word 'been') nor is he n my said bailiwick.

he answer of *Michael Gibbs*, Esq. and *Thomas mbe*, Esq. sheriff."

n this rule being served on the present sheriff of *esex* (*Rogers* and *Magnay*), Sir *T. Wilde* Serjt. ed a cross rule on the part of the *late* sheriff and *Farncombe*) to amend the return, by insert- e word "been" which had been omitted.

Nov. 9.

h rules now coming on together, Sir *T. Wilde* e behalf of the present sheriff (*Rogers* and *Mag-*

(a) Which see, *antè*, Vol. II. 437.; and see 9 *M.* & *W.* 405.

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CASSIDY v. STEUART.

nay), who had been served with the rul
Spankie Serjt., stated that the rule was
being directed to *the sheriff*, that is, the
whereas the return complained of was ma
sheriff.

The court being of this opinion,

The plaintiff's rule dischar

Spankie Serjt. offered no opposition to
but urged that it could be made absolu
terms of paying the costs, which the pl
curred by a careless blunder on the pa
sheriff.

TINDAL C. J. The plaintiff having no
in opposition to this motion, had no occa
upon the rule, though called upon to do
any cause to shew against it.

The late sheriff's rule absolute wit

(a) *Vide tamen Doe dem. Tansley* v. *Roe, ant*

Nov. 23.

MILLER *v.* THOMSON.

An instrument in the form of a bill of exchange, drawn upon a joint stock bank by the manager of one of its branch banks, by order of the directors, may be declared upon as a promissory note.

ASSUMPSIT against the maker of
note for 100*l.*, payable to the order
Francis at six months after date, and
Francis to the plaintiff.

The declaration had originally containe
a bill of exchange; but upon a statemen
strument only existed, the plaintiff was pu
tion, and the count on the bill was struck

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MILLER v. THOMSON.

· first, *non fecit*; secondly, that the note was
d from the defendant by the fraud and covin of
, whereof the plaintiff had notice at the time
indorsement; thirdly, that the note was so ob-
and was indorsed to the plaintiff without con-
on.

he trial before *Tindal* C. J., at the sittings at
ster after last *Hilary* term, the following in-
nt was produced in evidence:—

ndon Trades' Joint Stock Banking Company.

" *Dorking, Surrey*, 24th *August*, 1839.
x months after date, pay, without acceptance, to
der of *John Cogan Francis*, Esq., 100*l.* value re-

ned) " For the Directors.

" *Thomas Newham*, Manager,
ssed) " The *London* Trades' Joint Stock Bank-
mpany, 33. *Gracechurch Street, London.*"

e words in italics were in the hand-writing of
s, the remainder being a printed form. Both
s and the defendant were directors of the com-
which had a branch bank at *Dorking*, of which
n was the manager.

the part of the defendant it was contended, that
ue was not proved, inasmuch as the instrument
ed was not a promissory note but a bill of ex-
. For the plaintiff it was urged, that the in-
nt being ambiguous in its form, it might be
either as a note or as a bill, at the option of the
; and that supposing it to be necessary, it was
tent to the learned judge, under the 3 & 4 *W.* 4.
s. 23. to direct the record to be amended. His
ip ruled that there was no variance between the
ion and the proof, and he also directed that

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MILLER v. THOMSON.

the special matter should be endorsed o
whereupon a verdict was taken for the p
being reserved to the defendant to move t
suit.

Channell Serjt., in *Easter* term last, ob
nisi for entering a nonsuit pursuant to
served, against which

Sir *Thomas Wilde* Serjt. now shewed ca
an instrument issued by the *London* Trad
Banking Company, and directed to the c
this instrument there were no parties exc
and *Thomas Newham*, the manager of the
representing the directors, is the only p
responsibility; which is made more evide
cumstance of the bill being directed *not* t
In a large undertaking, as this was,
naturally be some partners upon whom
ment would more particularly rest; but
prevent the act of the managing partner
of the partnership. The words "*for* t
mean "*by order of* the directors." But
by a party on himself is nothing more th
sory note. This was an instrument issue
persons who were to pay. [*Tindal* C.
transaction is by one company.] It is one
firm ordering payment to be made by a
The payment is to be made out of the f
Newham, the drawer, was the manager.
document is ambiguous, it may be treat
bill or a note, at the option of the hol
Bury. (*a*) The same point was ruled,

(*a*) 6 *B. & C.* 433., 9 *Dowl. & Ryl.* 452.; and
P. 559. *S. C.*

1841.

MILLER v. THOMSON.

f that case, by Lord *Lyndhurst* C. B., in *Block* *a*)

amendment were necessary, this case would stinctly within the powers given by the act. y difficulty attending it would be the alteration lea. [*Tindal* C. J. It will be better to hear side on the first point.]

ell Serjt. in support of the rule. The bill was a different place from that in which it was to (*b*) The bank established in *London* had a ank at *Dorking*. The circumstance of its being id "without acceptance," does not make the nt less a bill of exchange; *The Queen* v. *Kin-* [*Maule* J. The holder of a bill is not bound t it for acceptance. The effect of such a clause of exchange would probably be, to exempt the rom liability to pay upon refusal by the drawee t. *Tindal* C. J. This company is not incor- The instrument in question, supposing it to of exchange, is a bill drawn by some of the upon the firm.] In *Edis* v. *Bury* the instru- l all the properties of a promissory note; and v. *Bell* there were the requisites as well of a a note.

amendment were directed, not only must the altered, but an allegation of presentment, or of excuse of presentment, must be introduced.

Mood. & Rob. 149.

was formerly essential idity of a bill of ex- at it should be pay- different place from hich it was drawn. — qu'il y ait remise d'un autre, c'est à dire, qu'on donne dans un lieu pour recevoir dans un autre lieu; cette remise d'un lieu à un autre est ce qui constitue l'essence du contrat de change, dont la lettre de change est l'execution." *Pothier, Contrat de Change*, No. 30.

(*c*) 2 *Mood. & Rob.* 117.

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TINDAL C. J. It appears that the di
of what is described, in the printed word
the instrument, as "The London Trad
Banking Company." It is an instrumen
of several partners, directing that a sum
be paid by the partnership at a different
is an absence of the circumstance of t
distinct parties as drawer and drawee, w
to the constitution of a bill of exchange. (
so, the only alternative is, that this instr
missory note, and is properly declared u

COLTMAN J. I am of the same opi
strument must be taken to be signed by
behalf of the company. It is signed
very form set forth in their prospectus.

ERSKINE J. I am of the same opinio
ment is a draft by the company upon th
which is carried on in *London*. It is, in
but a promissory note.

MAULE J. This is a bill drawn by
pany, acting by their directors, upon t
pany. It is a promise made by one pa
behalf of the company, under the order
that the company shall pay. It is a p
the company, at *Dorking*, to pay in *Lond*
fore, in effect, a promissory note.

R

(*a*) "Il y a trois choses principalement qui constituent l'essence de la lettre de change. 1. Il faut qu'il y soit fait mention de trois personnes ; de celle qui tire la lettre, de celle sur qui elle est tirée, et de celle à qui elle est pay
ubi suprà. T
conditions ha
out (*antè* 579
relates to the
ments of the
nance.

1841.

MORRELL *v.* MARTIN. *Nov.* 25.

Replevin by *A.* against *B.* for taking the goods of *A.* Plea, that after the passing of the 5 & 6 *W.* 4. *c.* 50. two justices made their warrant in writing, directed to the surveyors of the highways (way-wardens) of *H.*, and to the constable of that parish, reciting that by a certain rate, *A.*, occupier of lands in *H.*, was duly assessed to the repair of the highways of the said

LEVIN. The declaration stated, that on the
h of *February* 1837, at the parish of *Hawkhurst*,
ounty of *Kent*, in a certain place there called
defendant took divers, to wit, two stacks of
the plaintiff of great value, to wit &c., and un-
ained the same, against sureties and pledges,

efendant pleaded, *inter alia*, that after the pass-
act of parliament made and passed in the 6th
he reign of King *William* IV., intituled &c. (*a*),
r the 20th of *March* 1836, in the said act of
nt mentioned, and before &c., to wit, on the
bruary 1837, one *Pattenson* and one *Monypenny*,
ng two of His said late Majesty's justices of
e in and for the county of *Kent*, residing in,
ng in and for, the division and limit of the
vision of the lath of *Scray* in the county afore-
de and issued their certain warrant in writ-
er their hands and seals, directed as therein-
ntioned, and in the words and figures or to the
and effect, following, that is to say, "*Kent*, to

certain sum, which had been demanded, but that *A.* had refused to pay
and that he had been summoned and had not appeared, whereupon the
s were commanded to levy the amount by distress and sale of his goods.
hen stated that the defendant was constable, and that *C.* and *D.* were
(way-wardens) of *H.*, and that the warrant being delivered to *C.* and
B., the latter, in aid of *C.* and *D.*, and by virtue of the warrant, seized
of *A.*

n general demurrer, that the plea was neither in form nor in substance,
ler the statute; and that it was not a good plea at common law, inas-
did not allege that the justices had jurisdiction over the subject-matter
of which the warrant was granted.

(*a*) 5 & 6 *W.* 4. *c.* 50., the general highway act.

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wit. To the surveyors of the highways of *Hawkhurst*, in the said county, and to of the said parish aiding and assisting the in and by a rate and assessment made lowed, and published according to the case made and provided, bearing date 1836, *Robert Morrell*, Esq. (the plaintif of tithes, lands, and tenements in the *Hawkhurst*, was duly rated and assess wards the necessary repair of the highw parish in the sum of 51*l.* 0*s.* 5*d.*; and appeareth unto us, two of His Majesty's peace in and for the said county, as well of Mr. *T. M. Durrant*, one of the su highways of the said parish, as otherwis sum hath been lawfully demanded by hi said *Robert Morrell* hath refused, and do the same; and whereas it also appeare the said *R. Morrell* hath been duly sum cause why he refuseth to pay the said ment, and that the said *R. Morrell* hat according to such summons, and hath sufficient cause why the same should These are, therefore, to require you for distress of the goods and chattels of th *rell*, and if within the space of five days distress by you taken, the said sum of 5 ther with the reasonable charges of taki the said distress, shall not be paid, that the said goods and chattels so by you out of the money arising by such sale, the said sum, and all reasonable cha keeping, and selling the said distress, overplus, on demand, unto the said *R.* no distress can be made, that then you unto us, to the end that such further p be had therein as to the law doth appe

verment, that before and at the time of the and issuing of the said warrant, and thence d at and after the said time when &c. in the ion mentioned, he, the defendant, was constable said parish of *Hawkhurst*, the same parish situate within the said division of the lower of the lath of *Scray* in the county aforesaid; t during all the time last aforesaid, one *Ayerst* *Durrant* were surveyors of the highways of ish of *Hawkhurst*, in the county aforesaid; said *R. Morrell*, in the said warrant men- was and is the said above-named plaintiff; t the said justices having so made their said as in the plea before mentioned, and the said and *Durrant* so being such surveyors as afore- d the defendant so being such constable as l, they the said justices afterwards, to wit, on and year last aforesaid, delivered the said war- the said *Ayerst* and *Durrant*, as surveyors as l, and to him the said defendant, as such con- s aforesaid, to be executed in due form of law. ore, and because the defendant, as such con- s aforesaid, was then required by the said *Ayerst* *rant*, to act in their aid and assistance, as such rs as aforesaid, he the defendant, as such con- and acting in aid and assistance of the said and *Durrant* as such surveyors as aforesaid, and request, by virtue of the said warrant, and in n thereof, seized, took, and detained the said nd chattels of the plaintiff in the declaration ed, the plaintiff being the said *R. Morrell* in the rant mentioned, in the said place in which &c., ithin the said division of the lower division of of *Scray* in the county aforesaid, as for and in e of a distress for the same sum of 51*l.* 0*s.* 5*d.* aid warrant mentioned; as by the said warrant

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was commanded; which seizing, taking, are the same supposed grievances whereo has in his said declaration above compl him the defendant. Verification.

General demurrer; and joinder.

April 19. *Ludlow* Serjt., for the plaintiff. This p said to be, either in form or in substance, the general highway act. Neither is it at common law, being merely a justificati warrant; and with respect to the warra contains is by way of recital only. It i for the defendant to say that he acted u rant; he should have shewn that the justi diction over the subject-matter to whi Although it was competent for the defen avow, or to justify, the taking of the plai *Com. Dig. Pleader* (3 K. 12.), *Aylesbury* v yet, as he has adopted the latter co bound to disclose a complete justification and detaining on the face of his plea. by the general highway act, 5 & 6 *W.* 4. "that a rate shall be made, assessed, by the surveyor upon all property now rated and assessed to the relief of the p that the same rate shall also extend to mines, and quarries of stone, or other here have heretofore been usually rated to t and provided also that every such rate sh by the said surveyor, and allowed by tw the peace, and published in the same way are now allowed and published." The section provides, "that for levying and re said rate by this act authorized to be ma

(a) 3 *Lev.* 204.; *Lev. Entr.* 152.

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all have the same powers, remedies, and privi-
the overseers of the poor." And the 109th
enacts, "that no action or suit shall be com-
against any person, for any thing done in pur-
or under the authority of the act, until twenty-
s' notice has been given thereof, in writing, to
ce, surveyor, or person against whom such
intended to be brought, nor after sufficient
on or tender of satisfaction has been made to
y aggrieved, nor after three months next after
committed for which such action or suit shall
ought; and every such action shall be brought,
d tried where the cause of action shall have
nd not in any other county or place; and the
t in such action or suit may plead the general
d give this act and every special matter in
at any trial which shall be had thereupon,"
is is clearly not a good plea under the above
It was held in *Fletcher* v. *Wilkins* (*a*), that
is not an action within the 24 *G.* 2. *c.* 44. *s.* 6.,
nacts, that no action shall be brought against
ble for any thing done in obedience to any
of a justice of the peace, until demand of the
and copy of such warrant, &c. Here, all that
avers is, that two magistrates granted a war-
inst one *Robert Morrell*, and that the plaintiff
erson, and that the defendant as constable, and
the surveyors of the highways, seized the goods
e warrant. It is laid down in *Com. Dig.* tit.
(3 K. 26.), that "by the statute 23 *H.* 8. *c.* 5.
ndant may avow generally, that he took by
of the commissioners of sewers, for an assess-
such commission; *Co. Litt.* 283 a.: so he may
virtue of a warrant to distrain for the poor

(*a*) 6 *East*, 283.

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rates, pursuant to the statute of 43 *Eliz.* but if the defendant waives the short pl by the statute, and shews the special m plead all things sufficiently, otherwise *Whitley* v. *Fawsett*, *Style*, 12. *Lutw.* 1 avowry, all the facts necessary to shew of the justices should be set out. *Selby* In that case it was held, that the who issue by *de injuriâ*, and that such pl good. (*b*) So, in *The Governor &c. o the City of Bristol* v. *Wait* (*c*), the avow the circumstances under which the war had been granted. It appears from th constable cannot justify under a warra shews that the justices had jurisdiction to which it relates; *Morse* v. *James* (*d*) *James* (*e*), *Hurrell* v. *Wink* (*g*). In *Keith* (*h*) a plea, which, in justifying und of a foreign court, only stated,—that th was governed by foreign laws; that the was within its jurisdiction; that certain ings were had, according to such foreig the property in question, in such cou petent jurisdiction in that behalf, *et ta* &c. that the defendant was ordered by having competent authority in that beha property;—was held bad, on the ground general, and did not give the plaintiff the defendant justified as an officer o party to the cause, or of what nature th or by whom instituted, or what the or was, whether absolute or *quousque*, &c

(*a*) 3 *B. & Ad.* 2.
(*b*) *Dissentiente* Lord *Tenterden* C. J.
(*c*) 5 *A. & E.* 1., 6 *N. & M.* 383.
(*d*) *Willes*
(*e*) *Ibid.* 1
(*g*) 8 *Taun*
(*h*) 2 *East*

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istifying under the process of inferior country, there says, "it is necessary, not generally, *that they had jurisdiction* over tter, but to state *what the jurisdiction* llege *such facts as may enable the superior whether the court below had jurisdiction not.*" *Evans* v. *Munkley* (*a*) is an au- ke effect. It is submitted that this plea it does not disclose the necessary facts e court can infer that the justices had to grant the warrant.

jt. *contrà*. As the objection arises here nurrer, it will be sufficient if this plea be nce. The thirty-fourth section of the high- he surveyor "the same powers, remedies, as the overseers of the poor of the parish or the recovery of any rate made for the oor." Here, as the defendant was acting surveyors, he may avail himself of any o them; and it is clear that if this action pass, he would have been entitled to the e 24 *G.* 2. *c.* 44. *s.* 6. *Fletcher* v. *Wilkins*, n cited to shew that the last mentioned ot extend to actions of replevin, is in- r that was the case of an avowry; and o doubt, where a defendant claims a re- ods of which the plaintiff seeks to retain that he stands in a very different situa- rdinary defendant. Here, the defendant, ning the goods, pleads in bar; as in many must do. *Com. Dig. Pleader* (3 K. 12.). g that in this case the justices who signed ight have been liable to the action, the

(*a*) 4 *Taunt.* 48.

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defendant is, at any rate, protected b
nothing in it to shew that they had n
grant it. In *The Marshalsea* case (*a*)
that "if a justice of the peace makes a
one for felony who is not indicted, th
errs in making the warrant, yet he
arrest by virtue of that warrant, shall
by writ of false imprisonment, becaus
the cause." So, it was held in *Hil*
upon a conviction for destroying game,
who had sent the plaintiff to prison,
sufficient goods on which the penalty
levied, was liable in an action of fals
but that the constable was justified by
being in a matter within the jurisdictio
The case which approaches the neare
is *Painter* v. *The Liverpool Gas Li*
There, a statute establishing a gas light c
that if any person should refuse or negl
after demand, to pay any rent due from
pany for the supply of gas, such ren
covered by the company or their cler
any justice of the peace for the town &
be lawful for the company, or their cle
acting under their authority, with such
the sum so due by distress and sale of
party so neglecting or refusing to p
might be recovered by an action, &c
distraining the plaintiff's goods under
by a justice without previously summo
the party to be distrained upon, the c
under the warrant, and stated that it w
complaint of their collector, and that h

(*a*) 10 *Co. Rep.* 76.
(*b*) 2 *Strange*, 710.
(*c*) 3 *A. M.* 736.

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er their authority, seized the plaintiff's goods
irpose of levying a sum owing by him to them,
demanded according to the act: it was held
warrant, although it would have protected the
an officer, was no justification to the company,
having acted *in obedience* to it, but having put
e *as parties.* Lord *Denman* C. J. after stating
warrant was illegal said, "But then the ques-
hether the warrant, though improperly issued,
ect these parties. A warrant is a justification
s, because they are not to canvass the legality
ocess they have to execute. Acts of parliament
n passed for their protection, founded on that
; and it is a just one; for it would be absurd
officer charged with the execution of a warrant,
ave to pause and consider whether it was re-
ssued or not." In *Selby* v. *Bardons* the sole
was, whether *de injuriâ* was a good plea in
n avowry. *The Governor, &c. of the Poor*
ity of Bristol v. *Wait,* like *Fletcher* v. *Wilkins,*
se of an avowry. In *Ladbroke* v. *James* the
ed a judgment of a court of inferior jurisdic-
which case it is requisite to set out the facts
e court jurisdiction; and in *Morse* v. *James,* the
hy the officer was not held to be justified was,
plea did not, upon the face of it, shew that the
warding the process, had jurisdiction. Here,
ng appears in the warrant which was required
he justices jurisdiction; for it states the magis-
anting the warrant to be justices in and for the
in which the parish is situated wherein the
is a ratable occupier. Where the party against
similar warrant to the present is issued, has no
roperty, he may maintain trespass against the
but such an action will not lie against the con-
xecuting the warrant.

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Ludlow Serjt. in reply. The quest
a party may plead that he acted un
without shewing that the magistrates h
If he may, the act of the 24 *G.* 2. *c.*
necessary so far as it relates to constabl
admitted, that if the justices have juris
stable, though acting under an irregu
justified; but if they have not jurisdictio
stable is not protected, supposing the
ever so regular. This plea is clearly a
law; for the defendant has not availed
protection of any statute; and there is n
common law, a justification must be ple
stable is bound to see that the magistrat
warrant have jurisdiction. But this pl
such averment; for the recital in the
existence of certain facts is not sufficien
There is no averment that any rate wa
that the plaintiff was the occupier of any
It is clear, that if the action had been
the justices or the surveyor, they could n
under this warrant without shewing a
the plaintiff, as an occupier, had been dul
no authority has been produced for the p
a constable, who does not avail himself
but pleads a plea at common law, stand
position.

TINDAL C. J. now delivered the ju
court.

This was an action of replevin for
taining two stacks of wheat, the property
The defendant pleaded a plea in just
seizing and detaining of the same, viz.

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e 5 & 6 *W.* 4., intituled "An act to con- amend the laws relating to highways in vo of His late Majesty's justices for the *nt*, residing within, and acting in and for, f the county therein mentioned, made and varrant, which the plea set out in terms, ng a warrant addressed to the surveyors ays of *Hawkhurst* in the county of *Kent*, nstable of *Hawkhurst*, reciting, that *R. Mor-* ier of lands in *Hawkhurst*, was duly rated of the highways of the parish in a certain nentioned, which had been duly demanded hich he had refused to pay, and that he had ed and had not appeared; and the warrant cted them to levy the amount by distress e plea then averred, that the defendant was *Hawkhurst* within the said division, and d *Durrant*, mentioned in the warrant, were he highways, and that *R. Morrell*, named in was the plaintiff in the action; and so jus- he warrant, as acting by the desire and in ance of *Ayerst* and *Durrant*.

ea of justification there was a general de- oinder thereto.

argument it was contended, on behalf of that the plea was bad, being neither a d by the statute, nor a plea that was good w.

first point we are of opinion, that this r in form nor in substance a plea under the statute, by sect. 34. gives the surveyor ers, remedies, and privileges as the over- oor have, by law, for the recovery of any the relief of the poor. And admitting that acting in aid of the overseer, would come nefit of this clause, and that according to

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the case of *Gins* v. *Dams* (*a*), a plea which
the distress was made by virtue of the sta
beth is good under the statute, though it d
the precise words of the act; yet in this
has no such allegation in substance, but,
trary, avoids all reference to the authority
except in stating that, in point of time, the
granted after the statute 5 & 6 *W.* 4. *c.* 5
operation. Neither is the present plea
such plea under the statute, in point of
effect; for under the plea given by the
defendant must have proved at the trial, th
granted their warrant upon a subject-matte
jurisdiction; whereas the present plea neith
the subject-matter of the warrant was wit
diction nor requires that it should be shew

The question, therefore, secondly abov
be considered, *viz.* whether this is a
common law, that is, where a constable j
pass under a warrant directed to him un
and seals of two justices, whether it is su
to state in the plea, that the two justices d
warrant under their hands and seals agai
of the plaintiff directed to the defendant,
justices of the peace of the county, and
fendant was a constable of the county;
whole of the allegation contained in th
whether the plea must also state the fac
which the subject-matter to which the wa
is shewn to have been within the juris
justices granting the warrant.

There is a great difficulty, at first sig
ciling the cases which have been broug
before the court. It is clear, from all t
neither the justices who issued the warra

(*a*) 2 *Lutw.* 1179. 1280. 1st objecti

surveyors who set the justices in motion, could
tified the act done under the warrant, without
that the party rated was an occupier and had
uly assessed; for no distinction can in this re-
ist between the highway-rate and the poor-rate;
cases are express, that if a person be assessed to
ef of the poor who is not by law liable, and
ls are taken by warrant of distress, an action of
will lie against the overseers levying under the
; *Nichols* v. *Walker* (*a*), *Milward* v. *Caffin* (*b*);
nst the magistrates who issued the warrant;
mherst v. *Lord Somers* (*c*), *Weaver* v. *Price* (*d*);
ground of these decisions appears from what is
Nichols v. *Walker*, viz. "that the magistrates
it a particular jurisdiction, to make warrants to
es well assessed."

t is contended on the part of the defendant, that
er to whom the warrant is directed stands in a
t position from either the magistrates or the sur-
that he knows nothing but what the warrant
s; and that if no want of jurisdiction appears
e face of the warrant, he stands protected by
rant for what he does under it. And *The Mar-*
case (*e*) is relied on for this purpose, where it is
t "if a justice of the peace make a warrant to
one for felony who is not indicted, though the
errs in making the warrant, yet he who makes
est by virtue of that warrant, shall not be
d by writ of false imprisonment, because he (that
justice) is the judge of the cause;" which point
and relied upon in the case of *Webb* v.
our. (*g*) And the case of *Hill* v. *Bateman* (*h*) is

Cro. Car. 394.
2 *W. Black.* 1331.
2 *T. R.* 372.
3 *B. & Ad.* 409.

(*e*) 10 *Co. Rep.* 76.
(*g*) 1 *Vent.* 273.
(*h*) 2 *Str.* 710.

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also relied on, where, upon a conviction for destroying game, the justice who committed the man to prison when he had goods sufficient to defray the penalty, was held to be liable in an action for false imprisonment; but the constable was held to be justified. So also in *Webb* v. *Batchelour*, where the defendants justified under a warrant of a justice to distrain for not performing statute duty on the roads, and the objection was, that he ought to have been summoned before the distress warrant was granted, it is said by the court, "that the officer that executes the warrant (though unduly made for the cause alleged) is not answerable, for he is not to judge but to execute the matter, it being within the jurisdiction of a justice of the peace." And in the case of *Painter* v. *The Liverpool Gas Light Company* (a), the same doctrine was expressly laid down by the court.

But notwithstanding the inference to be derived from these cases, we think the sounder construction is, that in the case of a justification at common law by a constable under the warrant of a justice of the peace, the plea is bad which does not shew the justice had jurisdiction over the subject-matter upon which the warrant is granted. If, at the common law the constable might have justified under the warrant simply, and independently of the consideration, whether the justice who issued it had jurisdiction or not, there would surely have been no necessity for the enactment contained in the sixth section of the 24 *G.* 2. *c.* 44., that if after a demand of the warrant, the action is brought against the constable without making the justice of peace defendant, the jury shall give their verdict for defendant, "notwithstanding any defect of jurisdiction in the justice of the peace;" and if such action be brought jointly against them both, then, on proof of such warrant, the jury shall find for

(a) 3 *Ad. & E.* 433., 6 *N. & M.* 736.

nstable, "notwithstanding such defect of juris- " a provision which necessarily implies, as it to us, that at common law, and before the sta- e want of jurisdiction in the justice took away tection of the constable who executed the war- And we take the law on this subject to be cor- id down in the second resolution in the case of *rshalsea* before referred to, viz. "And a differ- is taken where a court has jurisdiction of the nd proceeds *inverso ordine* or erroneously; there, e party who sues, or the officer or the minister ourt who executes the precept or process of the o action lies against them. But where the s no jurisdiction of the cause, there the whole ng is *coram non judice;* and actions will lie hem, without any regard of the precept or pro- l therefore the said rule cited by the other side, jussû judicis aliquod fecerit (but when he has liction, non est judex), non videtur dolo malo quia parere necesse est,' was well allowed; but of necessity to obey him who is not judge of e no more than it is a mere stranger." And lication of this distinction may explain the of the decisions before referred to, and on e defendant has relied; for in those cases it the justice had a general jurisdiction over the natter, but had proceeded *inverso ordine*, grant- warrant before the summons; whereas in the ase, so far as appears by the plea, the parties jurisdiction whatever. And there are cases ave expressly decided that the officer is liable ting the warrant where the magistrate granting jurisdiction. Such is that of *Shergold* v. *Hol-*, where it was resolved, "that a justice had no

(a) 2 *Str.* 1002.

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power to grant a warrant to apprehend the party for refusing to pay wages due to a servant; he can only issue a summons; and that a warrant, expressly to arrest the party, will not justify the officer, there being no pretence for such a jurisdiction." So also in *Rooke's* case (*a*), where the defendant justified the taking by authority of a commission of sewers directed to *B. S.* and others, because one *Carter* was assessed to every acre for repairing of a bank, &c., for the non-payment of which he took the distress. On special verdict, the distress was held to be bad, because *Carter* alone was assessed, whereas all the lands in the level ought to have been assessed. So that, in this case, though the commissioners had jurisdiction to make *an* assessment, yet the warrant granted upon the particular assessment was held no justification to the party executing it. In *Brown* v. *Compton* (*b*), which was an action against the sheriff for an escape, where the justices had discharged an insolvent debtor under the 37 *G.* 3. *c.* 112., at an adjourned session held after the passing of the act, but being the adjournment of a session originally held before it passed; it was ruled that they had no jurisdiction, and that the sheriff (*i. e.* the officer) was liable. And the case of *The Queen* v. *Burnaby* (*c*) is strong to shew that in the opinion of the judges who decided it, where the justices of the peace have no authority to convict, but nevertheless they proceed to convict, and to grant their warrant, though the warrant be good on the face of it, the officer who executes it is liable. And lastly, in the case of *The Company of Margate Pier* v. *Hannam* (*d*), the observations of Lord *Tenterden* are expressly to the point, that where the act of the justice in granting a warrant is *invalid*, all persons who act in the execution of the warrant will act without any authority,

(*a*) 5 *Co. Rep.* 99 *b.*
(*b*) 8 *T. R.* 424.
(*c*) 2 *Ld. Raym.* 900.
(*d*) 3 *B. & A.* 266.

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it is otherwise where the proceedings are *in-* only.

n these grounds it appears to us, that when a authority only is given, as in the present case, arty to whom such authority is given, extends ercise of his jurisdiction to objects not within warrant will be no protection to the officers who er it; and that, by necessary consequence, where er justifies under a warrant so granted by a of limited jurisdiction, he must shew that the was granted in a case which fell within such jurisdiction; and that the present plea containing icient allegation to bring the case within the tion of the justices, is bad, and that there must ment, on such plea, for the plaintiff.

Judgment for the plaintiff.

LANE and Others *v.* BURGHART.

Nov. 25.

UMPSIT. The declaration set out a special reement, by which, in consideration that the s would discharge from custody one *Anthony* *A.*, the execution creditor of *B.*, agreed to discharge *B.* out of

upon his executing a warrant of attorney to secure the payment of the instalments, and upon *C.*'s signing an undertaking, whereby, in con- of *A.*'s discharging *B.* out of custody in the action, *C.* undertook that l pay the debt, together with interest, by instalments. The warrant of being executed, and the undertaking signed, *B.* was discharged from A fiat was afterwards granted against *C.*, under which he was de- ankrupt, and obtained his certificate.

that the certificate was no bar to an action against *C.* for an instalment after the fiat; that, inasmuch as *B.* continued liable as the plaintiff's y virtue of the warrant of attorney executed by him previously to his , and the defendant's undertaking was given with reference to *B.*'s and as a collateral guarantee for the payment of the instalments secured arrant of attorney, and as no instalment had become due before the fiat, *no debt due from the bankrupt* at the issuing of the fiat which could have ved under it.

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Bacon, then a prisoner in execution at the suit of the plaintiffs, the defendant undertook and promised that *Bacon* should pay to the plaintiffs the debt for which he was so in custody, together with interest, by four equal half-yearly instalments. Breach: non-payment by *Bacon* of the *third* instalment, which became due on the 17th of *May* 1840.

By his fourth plea, the defendant pleaded his bankruptcy and certificate, and that the cause of action accrued before he became bankrupt. Issue thereon.

At the trial of the cause before *Tindal* C. J., at the sittings at *Westminster* after *Trinity* term 1840, it appeared in evidence, that General *Bacon* being in custody upon an execution at the suit of the plaintiffs for a debt of 275*l.* 12*s.*, negotiations were entered into in order to obtain his discharge; and it was ultimately arranged that he should be released, upon his executing a warrant of attorney to secure the payment of the debt by instalments, and upon the defendant's guaranteeing the due payment of these instalments. The following undertaking was accordingly signed by the defendant.

"*Lane* and others *v. Burghart.*

"*November* 17th 1838.

"Gentlemen,— In consideration of your discharging the defendant out of custody in this action, I undertake that he shall pay the debt due to you, viz. 275*l.* 12*s.*, together with interest, by four equal half-yearly instalments, the first instalment to commence and be made on the 17th day of *May* 1839.

"*F. Burghart.*"

"To Messrs. *J. Lane*, *J. Sigel*, and *Æsculapius Newcombe.*"

Two days afterwards General *Bacon* executed a warrant of attorney, and he was thereupon discharged from custody.

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A fiat in bankruptcy issued against the defendant on the 26th of *April* 1839, under which he obtained his certificate on the 6th of *August* following. The plaintiffs had brought an action in the court of Queen's Bench for the first two instalments, and had recovered a verdict; but a rule nisi had been granted, and was still pending, for entering a nonsuit, upon the ground that the sum secured by the defendant's undertaking was a debt which might have been proved under the fiat. In that case, however, there was no evidence that a fresh security had been taken from General *Bacon*. In the present case, the jury found expressly that the warrant of attorney had been executed with the knowledge of the defendant; whereupon a verdict was taken for the plaintiffs for 74*l.* 18*s.*, the amount of the third instalment; leave being given to the defendant to move to enter a nonsuit, if the court should be of opinion, that the sum secured by the guarantee of the defendant, was a debt provable under the fiat.

Channell Serjt. having, in *Michaelmas* term last, obtained a rule nisi accordingly,

Bompas Serjt. (with whom was *Miller*) shewed cause in last *Easter* term. The question for the court is, whether the defendant, previously to his bankruptcy had contracted any debt with the plaintiffs. It is submitted that there was no debt due from the defendant to the plaintiffs at the time of his bankruptcy, which the latter could have proved under the fiat. Supposing General *Bacon*, whose duty it was to do so, to pay the debt, there never could be any debt due from the defendant. It was therefore a contingency, which was not capable of being valued under the fifty-sixth section (*a*) of the 6 *G.* 4. *c.* 16., which will be relied on by

(*a*) Which enacts, "that if any bankrupt shall, before the issuing of the commission, have contracted any debt payable

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the other side. It is clear, however, that this case does not come within that section, for here there is no debt "payable upon a contingency," but merely a contingent liability. [*Channell* Serjt. The defendant relies principally on the fifty-first clause.] There are several cases which shew that this was not a debt which could be proved under the fiat. In *Yallop* v. *Ebers* (*a*), the defendant, on certain considerations, undertook to pay the balance due on a bill of exchange of which plaintiff was acceptor, and he afterwards, by a new undertaking, engaged to deliver up the acceptance to the plaintiff within a month, or to indemnify him against it. The defendant became bankrupt, and did not pay or give any indemnity; and plaintiff was obliged to take up the bill; the bankrupt having then obtained his certificate. On action brought by the plaintiff for the breach of promise, it was held, that he could not have proved in respect of it under the defendant's commission, either for a debt not payable at the time of bankruptcy or for a contingent debt, or in the character of a surety; and therefore that the bankruptcy was no defence. So in *The Overseers of St. Martin's in the Fields* v. *Warren* (*b*), where the obligee of a bastardy bond, after the bond

upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted, may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends: provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

(*a*) 1 *B. & Ad.* 698.

(*b*) 1 *B. & Ald.* 491., 2 *Stark. N. P. C.* 188.

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had been forfeited, became bankrupt and obtained his certificate; it was held, that the parish officers were not precluded from recovering upon the bond further expences incurred subsequently to the bankruptcy. In *Atwood* v. *Partridge* (*a*), the defendant covenanted for the due payment by *A. B.* of a premium upon a policy of insurance effected to secure a debt due from *A. B.* to the plaintiff. The premium became due, and being unpaid by *A. B.* or the defendant, was paid by the plaintiffs. The defendant afterwards obtained his certificate under a commission of bankrupt: it was held, his certificate did not discharge him from the amount of the premium so paid. In *Johnson* v. *Compton* (*b*), an annuity, granted by *A.* to *B.*, was secured by a covenant by *C.*, a surety, to pay the annuity in case *A.* made default, and by a judgment entered up against *A.* and *C.* The annuity remained unpaid from *January* 1823, and *A.* having left the country in *February* 1824, *C.* became bankrupt, and afterwards obtained his certificate. *C.* having died, *B.* filed a bill, to have the arrears of the annuity paid out of his real and personal estates, and it was held, that neither the value of the annuity, nor the sum due on the former judgment was provable under *C.*'s commission; and, therefore, that his certificate was no bar to the plaintiff's demand. So it was held in *Thompson* v. *Thompson* (*c*), that the instalments of an annuity for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, when they become due *after* his bankruptcy, provable under a fiat against the surety. That case very nearly approaches the present. *Clements* v. *Langley* (*d*) is also an authority for the plaintiffs. Lord

(*a*) 4 *Bingh.* 209., 12 *Moore*, 431.

(*b*) 4 *Simon*, 31.

(*c*) 2 *New Ca.* 168., 2 *Scott*, 266.

(*d*) 5 *B. & Ad.* 372., 2 *N. & M.* 269.

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Denman C. J. there says, "The plaintiff's liability depended on two contingencies; first, whether the original debtor would pay, and secondly, whether, in his default, the co-sureties would be called upon. No direct liability arose till after the bankruptcy, and then I do not see that there was such a liability as could have been proved under the commission." *Ex parte Simpson* (*a*) shews that, in order to be provable under the fiat, there must be a debt payable upon a contingency, which is capable of computation. It is clear, that this is a mere guarantee by the defendant, amounting merely to a contingent liability, which was not capable of arithmetical calculation. It is perfectly immaterial, whether the original debt was discharged or not; for if it was, General *Bacon* took the payment of it again upon himself, by the warrant of attorney, which the jury have found to have formed part of the same transaction with the giving of the guarantee. The present case is distinguishable from that case before the court of Queen's Bench; for there was no proof in the latter case that General *Bacon* had executed a fresh security to pay the debt, and that being so, the defendant's engagement necessarily was an original undertaking and not a guarantee.

Channell Serjt. (with whom was *Cowling*) in support of the rule. The question is, whether this was an original undertaking on the part of the defendant, or a mere guarantee. It is submitted that it is an absolute promise to pay, and that the defendant's responsibility is not varied by the warrant of attorney given by General *Bacon*; for it is just the same as if the defendant had undertaken that the debt should be paid in a particular way. It has been said that it is immaterial whether the

(*a*) 1 *Mont. & Ayr.* 541., 3 *Deac. & Ch.* 792.

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original debt was discharged or not, as at all events General *Bacon* had taken it upon himself again. But supposing the latter to have done so, the arrangement thereby effected amounted to a new transaction, whereas, by this action the defendant is called upon to pay the old debt. *Starey* v. *Barnes* (*a*) is an important authority upon the question before the court. It was there held that the drawer of a bill of exchange, which had been accepted and was not refused payment by the acceptor till after the bankruptcy of the drawer, was discharged by his certificate, inasmuch as such debt was provable under his commission by the 7 *G.* 1. *c.* 31. *s.* 1. The words of that section are in substance the same as those of the fifty-first section (*b*) of the 6 *G.* 4. *c.* 16. The latter clause is not confined to notes or bills, but is sufficiently large to comprehend the present case. Here, the plaintiffs gave credit to the defendant "upon a valuable consideration," namely, the discharge of General *Bacon* from custody. In *Goodman* v. *Chase* (*c*) it was held, that where a defendant taken upon a *ca. sa.* is discharged out of custody by the consent of the plaintiff, the debt itself is extinguished; and, therefore, that a promise by a third person to pay the debt on condition of such discharge, was an original promise not falling within the fourth section of the statute of frauds.

(*a*) 7 *East*, 435.

(*b*) Which enacts, "that any person who shall have given credit to the bankrupt upon valuable consideration for any money, or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security, or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive at the rate of 5 per cent., to be computed from the declaration of a dividend to the time such debt would have become payable, according to the terms upon which it was contracted."

(*c*) 1 *B.* & *A.* 297.

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Other authorities are to be found in 1 *Wms. Saund.* 211. *n.* (2.) [*Erskine* J. Here the promise is that General *Bacon* shall pay the debt.] That merely points out the mode in which the payment is to be made. The cases which have been cited on the part of the plaintiffs are distinguishable from the present. [*Coltman* J. Supposing this to be a contingent debt within the fifty-first section of the 6 *G.* 4. *c.* 16., it would in fact be an annuity. If that clause is applicable to this case, *Thompson* v. *Thompson* should have been held to fall within it.] There, the liability of the bankrupt was merely that of a surety. Here, the agreement of the defendant was an original promise, and no difficulty could arise in calculating the amount provable under the fiat.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This was an action of assumpsit, in which the plaintiff declared upon a special agreement, by which, in consideration that the plaintiffs would discharge one *Anthony Bacon*, who was then a prisoner for debt in execution at the suit of the plaintiffs, out of custody, the defendant undertook that the said *Anthony Bacon* should pay the debt due to the plaintiffs, together with interest, by four equal half-yearly instalments, and then averred as a breach, the non-payment by *Bacon* of the third instalment, due on the 17th of *May* 1840.

The defendant by his fourth plea pleaded his bankruptcy and certificate, and that the cause of action accrued before the bankruptcy; and the only question raised at the trial was, whether the money claimed by the plaintiffs in this action constituted a debt that might have been proved under the defendant's bankruptcy. It appeared in evidence, that *Anthony Bacon* was, at the time when the undertaking was given on

which the action was brought, a prisoner in custody at the suit of the plaintiffs for the sum of 275*l.* 12*s.*, and that, upon a negotiation for his discharge, it was ultimately arranged, that upon *Bacon* executing a warrant of attorney to secure the payment of the debt by instalments, and the defendant giving a guarantee for the payment of those instalments by *Bacon*, he, *Bacon*, should be discharged out of custody. It was proved that a warrant of attorney was accordingly executed by *Bacon*, and that the defendant signed an undertaking addressed to the plaintiffs in the following form; — "*Lane and others* v. *Bacon*. In consideration of your discharging the defendant out of custody in this action, I undertake that he shall pay the debt due to you, viz. 275*l.* 12*s.*, together with interest, by four equal half-yearly instalments, the first instalment to commence and be made on the 17th day of *May* 1839;" and that thereupon *Bacon* was discharged out of custody. The fiat against the defendant was issued on the 26th of *April* 1839, under which the defendant obtained his certificate on the 6th of *August* following. The only question of fact raised at the trial was, whether the defendant knew that *Bacon* was to execute a fresh warrant of attorney for payment of the debt. This question was left to the jury, who found that the defendant knew of the warrant of attorney, and gave the undertaking with reference to it, and a verdict was thereupon taken for the plaintiffs for 74*l.* 18*s.*, the amount of the third instalment and interest, with leave to the defendant to enter a nonsuit, if the court should be of opinion that the sum secured was a debt that might have been proved under the defendant's bankruptcy. This point was accordingly argued before us in last *Easter* term: and it was contended on the part of the defendant, that as *Anthony Bacon* was in custody in execution under a *capias ad satisfaciendum*, the debt was extinguished by his discharge out of cus-

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tody, and, therefore, that the undertaking by the defendant was, not to pay on default of *Bacon*, but an original absolute undertaking that *Bacon* should pay, and, therefore, in legal construction, an absolute undertaking by the defendant to pay the amount of the debt by instalments; and that even though *Bacon* might have remained liable under the warrant of attorney, yet that in form and in substance, the defendant's undertaking was an absolute engagement that *Bacon* should pay, and was, in effect, an undertaking that the defendant would cause the debt to be paid, under which he would be liable as much as if he had promised to pay the debt himself; and that, consequently, though payable by instalments, it might have been proved under the fifty-first section of the 6 *G.* 4. *c.* 16. On the part of the plaintiffs it was insisted, that as *Bacon* had before his discharge executed a warrant of attorney to secure the payment of the debt by instalments, he continued liable as the principal debtor, and that the defendant's undertaking was a mere collateral engagement to indemnify the plaintiffs against the consequence of *Bacon*'s default to pay the instalments as they became due; and that as none of those instalments became due till after the defendant's bankruptcy, there was no debt due to the plaintiffs from the defendant at the time of the bankruptcy, and that no proof could have been made under the fiat in respect of the defendant's liability upon his guarantee, either under the fifty-first or fifty-sixth section.

At the time this case was argued before us, a rule was pending in the court of Queen's Bench in an action between the same parties for the recovery of the first two instalments payable under the same undertaking. That case has since been decided, and is now reported in 1 *Gale & Dav.* 312. (*a*) A distinction was taken in the

(*a*) Also now in 1 *Q. B. Rep.* 933.

argument before us as between the two cases, viz. that there was no proof before the court of Queen's Bench that *Bacon* had before his discharge executed a fresh warrant of attorney to secure the payment of the debt by instalments. And it appears by the report of that case, that the court held that the debt might have been proved under the defendant's bankruptcy, upon the ground that *Bacon*'s debt was entirely discharged by his release out of custody, and that as he could no longer be sued for it, or make default in respect of it, the defendant's agreement was, in effect, according to the case of *Goodman* v. *Chase* (*a*), an original undertaking to pay the amount of the sum that had been due from *Bacon;* and, therefore, that the instalments might have been estimated and proved under the defendant's bankruptcy. But inasmuch as in the case now before this court, it was proved that *Bacon*'s liability was kept alive by the execution of the warrant of attorney previously to his discharge, we think the decision of the court of Queen's Bench furnishes no rule for the determination of the present case, and that we must consider it with reference to the other authorities cited in the course of the argument. And after examining those authorities, we are of opinion that inasmuch as *Bacon* continued liable as the plaintiffs' debtor, by virtue of the warrant of attorney executed by him before his discharge, — and as the defendant's undertaking was given with reference to *Bacon*'s liability as a collateral guarantee for the payment of the instalments secured by the warrant of attorney,— and as no instalment had become due before the fiat, there was no debt owing from the bankrupt, at the date of the fiat, that could have been proved under it.

At the date of the fiat the defendant was liable in-

(*a*) 1 *B. & Ald.* 297.

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deed to indemnify the plaintiffs from the consequences of *Bacon*'s failure to pay the instalments; but there was *no debt* due from the defendant, payable in future, either absolutely or upon a contingency; there was merely a liability which might or might not terminate in a debt, and which was therefore altogether incapable of being the subject of any valuation by the commissioners. There was nothing consequently provable either under the fifty-first or the fifty-sixth sections of the bankrupt act.

The cases of *Taylor* v. *Young* (*a*) and *Thompson* v. *Thompson* (*b*), are strong authorities in favour of the plaintiffs; and the case of *Ex parte Simpson* (*c*) is clearly distinguishable, because, in that case, the default had occurred, and the extent of the defendant's liability had been ascertained, before the bankruptcy.

The rule therefore for entering a nonsuit must be discharged.

Rule discharged.

(*a*) 3 *B. & Ald.* 521., *antè*, 479 (*a*).; and see *Taylor* v. *Young, in error*, 2 *B. Moore*, 326., 8 *Taunt.* 315.

(*b*) 2 *New Cases*, 168., 2 *Scott*, 266.

(*c*) 3 *Deac. & Chitt.* 792., 1 *Mont. & Ayrt.* 541.

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ASSUMPSIT, upon an I. O. U. for 20*l.*

The plaintiff having given a peremptory undertaking to try at the first sittings in this term, the cause stood in the list for the 10th of *November*. One *Edward Byrne Davis*, the brother of the defendant, had been subpœnaed, on the 8th of *November*, to attend as a witness at *Westminster Hall* on the 10th of *April*, and so from day to day, &c., his evidence being required to prove the signature of the defendant to the I. O. U. The cause was not tried upon the 10th of *April*, but it stood second in the paper for the following day. On the 11th of *November* the cause was called on, when *E. B. Davis* not being in attendance, the plaintiff, by the advice of his counsel, withdrew the record; whereupon the defendant obtained a rule absolute for judgment as in case of a nonsuit.

A witness for the plaintiff, attended in court in obedience to a subpœna, but was absent, through negligence, when the cause was called on, and the record was, in consequence, withdrawn. There appearing to have been no wilful contempt, the court discharged a rule for an attachment, but without costs.

A plaintiff, under a peremptory undertaking to try, should not withdraw the record in consequence of the absence of a witness, when it is doubtful whether the remaining witnesses can prove his case, but should rather take the chance of a nonsuit.

Bompas Serjt. moved for an attachment against *E. B. Davis* for his contempt in disobeying the *subpœna*, upon an affidavit stating the above facts, and that *E. B. Davis* was a material and necessary witness for the plaintiff. A rule *nisi* having been granted,

Atcherley Serjt. now shewed cause, upon an affidavit, in which *E. B. Davis* swore that he attended at the Sessions House at *Westminster*, where the Common Pleas sittings at nisi prius are usually held, on the 10th, as required — that at half-past three o'clock he left the court, and was then given to understand that the cause would stand No. 7. or 8. in the list for the 11th — that

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he attended on that day at eleven in the forenoon, when he was informed that the cause had been called on, and the record withdrawn—that two other persons had been *subpœnaed* to prove the plaintiff's handwriting, one of whom was *James Lovell Jones*, the clerk to the defendant's attorney. *Jones* swore that he was well acquainted with the defendant's handwriting, and that the plaintiff's attorney must have been aware that he was so, inasmuch as he, *Jones*, had joined the defendant in an affidavit made in the course of the cause. (*a*)

This is an application of a criminal nature, differing altogether from any proceeding taken under the statute of *Elizabeth*, or for the recovery of damages. The witness is entitled to take any objection, though it be one of strict form. It must be shewn that there has been an actual failure of doing that which the party is required to do. There must be an intention to offend the court. The witness was required to attend, not at the Sessions House, but at *Westminster Hall*, on the 10th, and from thence from day to day till the cause was tried. The direction to attend at the Sessions House was merely a private notice, forming no part of the writ. If therefore, the witness was guilty of any disobedience, he disobeyed, not the writ, but the notice. [*Tindal* C. J. If the witness had come here, he would have been soon sent across the street to the place where the court was sitting. You do not shew that the witness was in attendance at *Westminster Hall*.] If he did not come into the *Hall* he would not see the notice. It should have appeared clearly that the evidence of the witness was necessary; *Dicas* v. *Lord Brougham* (*b*), *Dicas* v.

(*a*) This is a circumstance which might well warrant the plaintiff's subpœnaing the attorney's clerk. It does not necessarily follow that *Jones* had seen the defendant write; still less that he would acknowledge that, from having seen the defendant write once, he had acquired a knowledge of the character of his handwriting.

(*b*) 1 *Gale, Exch. Rep.* 14.

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Lawson. (*a*) Another witness was in court, who could have proved the handwriting of the defendant. [*Erskine* J. Was the instrument shewn to the other witness *Jones?*] That does not appear. A witness is not in contempt when not attending upon a *subpœna*, if he has reasonable ground for believing that his testimony will not be required; *Rex* v. *Sloman* (*b*), *Blandford* v. *De Tastet.* (*c*)

Bompas Serjt. in support of the rule. If the present rule is not made absolute, a hostile witness need never attend upon his *subpœna*. The plaintiff was properly advised to withdraw the record, for though he had some ground for expecting, that in the absence of *E. B. Davis*, the brother of the defendant, the handwriting would be proved by *Jones*, the defendant's attorney's clerk, *Jones* had refused to state whether he could prove the defendant's signature to the I. O. U., till he should have been called into the witness-box. [*Tindal* C. J. Suppose you had called the other witness who had failed to prove the handwriting, and you had been nonsuited, you might have moved for a new trial.] If the plaintiff had been nonsuited, the court would not have set aside the nonsuit without proof of collusion. A witness is not to speculate upon the supposed importance or nonimportance of his evidence. The counsel for the plaintiff exercised a sound discretion in withdrawing the record, and in not trusting to the evidence of the clerk to the adverse attorney. In *Dicas* v. *Lawson* no evidence could have been given by the witness which could have been made available for the purposes of the action.

TINDAL C. J. If it had appeared that the party had wilfully absented himself, we should not have inquired

(*a*) 5 *Tyrwh.* 235. 769., 1 *C. M. R.* 934., 3 *Dowl. P. C.* 427.
(*b*) 1 *Dowl. P. C.* 618.
(*c*) 5 *Taunt.* 260. 263., 1 *Marshall*, 42.

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whether he was a material or necessary witness, or whether his non-attendance had occasioned any injury to the plaintiff; but the witness has in some degree exonerated himself from the charge of wilful disobedience to the process of the court.

The plaintiff had two courses open to him; either to withdraw the record, or to take his chance upon the examination of one of the three witnesses subpœnaed to prove the defendant's handwriting. The plaintiff was under a peremptory undertaking to try. He was, therefore, liable to a motion for a rule absolute for judgment as in case of a nonsuit, if he did not proceed, and could only be nonsuited if he did. *Jones* might have been called, and the plaintiff's attorney knew, or had the means of knowing, that *Jones* could prove the handwriting of the defendant. (*a*) I am, therefore, of opinion that the rule ought to be discharged.

COLTMAN J. I am of the same opinion. It does not appear that the witness was guilty of any *wilful* default. He was in attendance during the whole of the first day, and came again at 11 o'clock on the following day. It would appear that the plaintiff had not a very good cause of action against the defendant, from the circumstance of his having been forced on to trial by a motion for judgment as in case of a nonsuit. The plaintiff takes no steps to set aside the judgment, but comes here to ask for the summary process of attachment against the witness. Our refusal to grant the attachment will not prejudice the plaintiff's right to proceed against the witness by action, in which he can recover only by shewing that he has sustained damage in consequence of the witness's neglecting to attend.

ERSKINE J. Though the witness has not, in my opinion, cleared himself from the charge of neglect and

(*a*) *Vide antè*, 610. n.

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inattention, I think there was no wilful contempt of the process of the court. The court may therefore grant or refuse the rule as they consider most conducive to the ends of justice. The plaintiff must have known that the defendant could obtain a rule absolute for judgment as in a case of a nonsuit, if the trial did not proceed. He does omit to proceed, and he takes no step to prevent the defendant from obtaining a rule absolute for judgment as in a case of a nonsuit, which he might have done by moving, in the usual course, to enlarge the peremptory undertaking.

MAULE J. I also think that the rule ought to be discharged. There appears to have been no intention on the part of the witness to treat the process of the court with disrespect, which intention must be clearly made out in order to entitle the party by whom he is subpœnaed, to an attachment; *The Queen* v. *Lord John Russell.* (*a*) The withdrawing of the record may have been thought the most *advisable* course for the plaintiff to take, as it gave him the chance of getting his money by fixing the witness. It is not the less true, that he has submitted to the entering of a nonsuit, in order to avoid the chance of a nonsuit. I agree that the plaintiff should have taken the chance of a nonsuit, and that he ought now to be left to his remedy by action. But as the witness did not obey the writ so diligently as he might have done, I think he ought not to have his costs for coming here.

Rule discharged without costs.

(*a*) 7 *Dowl. P. C.* 693.

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Nov. 11. T. F. EVANS and G. H. EVANS *v.* A. NICHOL and J. L. NICHOL.

A. has a sufficient property in goods shipped by *B.* for the specific purpose of placing funds in the hands of *A.* to meet a bill drawn by *B.* upon *A.*, to entitle *A.* to maintain trover, although no bill of lading is executed, and *A.* holds merely a receipt signed by the mate of the vessel, acknowledging the shipment of the goods,—to be delivered to *A.*

TROVER, for divers, to wit, fifty hogsheads of alkali; laying the value and the damages at 250*l.*

Pleas; not guilty; and, plaintiffs not possessed, *modo et formâ.*

At the trial, before *Tindal* C. J., at the sittings at *Guildhall* after *Michaelmas* term last, the following facts appeared.

The plaintiffs were chemists and drysalters, and also factors and brokers, carrying on trade in *London.* The defendants were the *London* agents of *Nichol, Ludlow,* and Co., who carried on business at *Newcastle,* as shipowners and wharfingers. The plaintiffs acted as factors and brokers for *Anthony Clapham,* an alkali manufacturer at *Newcastle,* who was in the habit of consigning alkali to the plaintiffs in *London,* for sale on his account, he being allowed to draw upon them to the extent of two thirds of the supposed value, but sometimes drawing, in fact, for the full amount.

On the 2d of *May* 1840, the plaintiffs were under acceptances for *Clapham* beyond the amount for which *Clapham* was entitled to draw in respect of goods in their hands belonging to him, if not to the full value of those goods. On that day *Clapham* wrote to the plaintiffs that he had drawn on them at four months date for 500*l.*, adding, "I hope to be able to ship twenty tons of soda and alkali the beginning of the ensuing week, per '*Hudgill.*' I have not been able to send you any this week, in consequence of the manufactory undergoing certain necessary repairs." On the same day the bill for 500*l.* was negotiated by *Clapham.* On the 4th

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of *May*, upon the receipt of *Clapham*'s letter of the 2d, the plaintiffs wrote to *Clapham* as follows: "We have now the pleasure to hand you account of sales for the past month, and hope the delay in forwarding them has given no inconvenience. We make the balance due to us 1671*l.* 18*s.* 9*d.*, which we trust will be found to be correct. We are sorry to have occasion to complain of the manner you are overdrawing your account. We cannot suffer this, as it is altogether irregular. We have occasionally accepted above the amount of two thirds of the value of your shipments, which was to have been the limit; but you are now drawing considerably above the value of the stock which we hold, either in the warehouse or by bills of lading. We are persuaded you will see the propriety of ceasing to break any more the agreement which you have made with us, and confine yourself entirely to its obligations. We shall be very sorry if you oblige us to refuse protection to your bills, which we shall be compelled to do if you draw again above the value of the goods which we hold of yours. The bill presented to-day will be accepted. This is wholly beyond the value of your stock, and we shall be obliged by your forwarding goods without delay. We have avoided hitherto charging interest for moneys paid, although we are out of pocket in that particular. We allow ditto in our barter transactions, as if cash were paid. Trade is so dull that if we were not soap-dealers we should do nothing in alkali."

To this letter *Clapham* returned the following answer on the 8th: "I have your account-sales and stock-account, both of which are quite correct. With respect to my overdrawing the account, it shall not occur again; but I have been pressed in financial matters, and I have gone further than I was aware of. I forward, *by this post*, particulars of soda and alkali. It may be next week before any quantity will be ready for shipment.

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In the present state of trade, you must decline all orders except such as you can supply from your stock in hand, and decline all outport orders whatever." Notwithstanding the intimation contained in this letter, no invoice was sent, nor were any particulars forwarded, by that post; but on the 14th of *June*, one *Atkinson*, who was an agent of *Clapham*'s, having come to *London* on other business, arranged with the plaintiffs that twenty tons of alkali and twenty tons of soda should be sent to meet their last acceptance. On the 19th *Clapham* sent twenty hogsheads and two tierces of alkali to Messrs. *Nichol, Ludlow*, and Co., wharfingers, shipping agents, and shipowners at *Newcastle*, to be shipped in *Clapham*'s name for *London*. A bill of lading was prepared, but *Nichol, Ludlow*, and Co., hearing that *Clapham* had stopped payment, refused to sign it, and refused to accept payment of the freight of that particular shipment, claiming a general lien on the alkali to cover a debt of 186*l.* 16*s.* owing to them from *Clapham* in respect of the freight of former shipments made by *Clapham* on board of their vessels. The keelman, however, who had taken the alkali from *Clapham's* works and put it on board the *London*, had obtained from the mate of the vessel the following receipt: —

"*Newcastle-upon-Tyne*, 5 mo. 19th, 1840.

"Received on board the '*London*' the under-mentioned goods from *Anthony Clapham*, to be delivered as below directed.

"No. 467 to 488 E."

"Twenty hogsheads and two tierces alkali, for *Evans*, Brothers.

"*London*.

"*William Robson*, mate."

Clapham forwarded this receipt to the plaintiffs, and effected an insurance on the goods on the voyage to *London*. On the arrival of the vessel in *London*, the

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tiffs required the alkali to be delivered to them. captain referred them to the defendants, to whom *ol, Ludlow*, and Co. had directed him to deliver the li. At a meeting between the plaintiff *Thomas F. Evans* the two defendants, the alkali was demanded, and reight on this particular shipment, 12*l.* 5*s.*, tendered. defendants refused to deliver the alkali on the nd that 186*l.* 6*s.* 6*d.* was due by *Clapham* for freight her goods previously conveyed in this ship, and also *Clapham*'s embarrassed affairs might subject them to im for the repayment of the value of these goods, to estate. The defendants, having failed in an attempt new a custom at *Newcastle* entitling ship-owners to neral lien in respect of former voyages (*a*), contended the plaintiffs had not established the possession put sue by the second plea. The learned judge, how-, held that as the alkali had, at the time of the ment, been appropriated to the 500*l.* bill, the pro-y in the goods vested in them; and a verdict was red for the plaintiffs for 212*l.*, the value of the li, leave being reserved to the defendants to move nter a nonsuit.

hannell Serjt. in *Hilary* term last moved to enter a suit according to the leave reserved, on the ground supposing the transaction to have amounted to a sale *Clapham* to the plaintiffs, yet as the goods were at *pham*'s risk, and insured by him, it was a peculiar ies of sale in which the property did not pass; and supposing the transaction to be not a sale but a ignment for sale, there had been no such delivery een the parties as entitled the plaintiffs to say that property in the goods had passed. [*Tindal* C. J. ruck me at the time, and still strikes me, that it is

(*a*) As to the admissibility of this defence under the plea of not assed, see *Brandão* v. *Barnett*, *antè*, Vol. I. 908.

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an important subject and fit for consideration, whether the bill of exchange made the particular shipment of goods not a mere consignment for the purpose of sale, but a transfer of a *quasi* property in the goods by way of pledge for the payment of the bill.]

A rule *nisi* having been granted,

Talfourd Serjt. (with whom was *Busby*) now shewed cause. It is not contended on the part of the plaintiffs, that as mere consignees, they would be entitled to maintain the affirmative of the second issue; *Kinloch* v. *Craig.*(*a*) The plaintiffs rely upon the fact of there being a specific appropriation of the alkali at the time of the shipment, to the payment of their acceptance; *Fragano* v. *Lloyd.* (*b*) In that case, it is true, there was no insurance by the consignor; but here, it is not the less an appropriation of the goods to the plaintiffs, because, by the custom of the trade, their removal is to be at the risk of the consignor; *Patten* v. *Thompson* (*c*), *Haille* v. *Smith* (*d*), *Bryans* v. *Nix* (*e*), *Holl* v. *Griffin* (*g*), *Vertue* v. *Jewell* (*h*), *Mitchell* v. *Ede.* (*i*)

Channell Serjt. *contrà.* The receipt signed by the mate did not operate as a bill of lading. It was not so understood, nor was it so treated by the parties. The goods, whilst on the voyage, were under the disposition of the consignor, and were at his risk. This sufficiently shews that the property still continued in him. (*k*) In *Haille* v. *Smith*, *Vertue* v. *Jewell*, and *Patten* v. *Thompson*, bills of lading were signed. The intention to allow the proceeds of the alkali to be applied in part

(*a*) 3 *T. R.* 783.
(*b*) 4 *B. & C.* 219., 6 *D. & R.* 283.
(*c*) 5 *M. & S.* 350.
(*d*) 1 *B. & P.* 563.
(*e*) 4 *M. & W.* 775.
(*g*) 10 *Bingh.* 246., 3 *M. Sc.* 732.
(*h*) 4 *Campb.* 31.
(*i*) 11 *A. & E.* 888., 3 *P. & D.* 513.
(*k*) *Vide* 2 *M. & Ryl.* 567. n.

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t of the acceptance for 500*l.*, was not, of itself, t to pass the property; *Kinloch* v. *Craig* (*a*), *Wait.* (*b*) The latter case is directly in) [*Maule* J. In that case *Combe*, the con- sought to intercept the delivery of the goods to ntiff. Here no such attempt has been made.]

AL C. J. It appears to me that this case may ded on a narrower ground than that which en at the bar, and that these defendants are d by the receipt signed by the mate, who was ent. In *Bruce* v. *Wait* the consignor had aban- his original intention, and the struggle was (*c*) the intended consignee and parties claiming process of foreign attachment issued against the or out of the *Tolzey* court at *Bristol.* (*d*) Here, ever was any abandonment of the original in- to appropriate this specific quantity of alkali to intiffs. *Bryans* v. *Nix* shews that where there en a specific appropriation by the consignor of to the consignee, subject to a condition prece- that case, the acceptance of a bill of exchange),

T. R. 783.
M. & W. 15.
n *Bruce* v. *Wait* the ts, besides setting up f possession under the of the Tolzey court, the property of the in the goods. It was d at the trial before C. J. at the *Bristol* as- 19, that this issue must for the plaintiff, a bare n without title being evidence of property as strangers, which, upon e, the defendants were to be; *Amory* v. *De-* 1 *Stra.* 505., 1 *Smith* 1. The learned chief justice, however, held that the question was substantially the same upon both issues. The judgment in the Tolzey court was afterwards reversed in this court, *antè*, Vol. I. 1. As the objection for which the judgment was reversed was apparent on the face of the plea, the plaintiff might have moved for judgment *non obstante veredicto*, if, instead of a nonsuit, there had been a verdict for the defendants upon the issue taken on the replication to the special plea, and for the plaintiff upon the issue as to the property.

(*d*) See these proceedings, *antè*, Vol. I. 1.

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the property, upon the performance of that condition precedent, vests in the consignee. Here, the bill was accepted before the alkali was shipped; and it appears to me that the consignor not having manifested any intention to alter the destination of the goods, the defendants are estopped, by the receipt signed by their agent, from disputing the title of the plaintiffs to have the goods delivered to them agreeably to the terms of that receipt. I am therefore of opinion that the plaintiffs are entitled to retain their verdict.

COLTMAN J. I also am of opinion that the plaintiffs are entitled to recover. Had the contest been between the plaintiffs and *Clapham*, *Bruce* v. *Wait* would have borne materially upon the question. In that case the court held that as between the consignor and the consignee, the property had not been transferred. Here, the consignor has not attempted to disturb the specific appropriation made by him, of this alkali, to the plaintiffs. The parties contesting this appropriation are strangers. They are mere wrongdoers; and against them, slight evidence of property is sufficient. (*a*)

MAULE J. I also am of opinion that the plaintiffs are entitled to judgment. Upon the shipment of the goods on board the *London*, upon the terms of being delivered to the plaintiffs, and the acceptance of the goods by the ship-owners upon those terms, the property vested in the plaintiffs to the extent of their interest, which was—the interest of persons with whom goods are pledged; *Bryans* v. *Nix*. It is admitted that if the plaintiffs had been vendees, instead of pawnees, of these goods, their right to recover could not have been disputed. The goods having been shipped by

(*a*) *Vide antè*, 619. (*c*)

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for the purpose of meeting the plaintiffs' ac- of the 500*l.* bill, and the ship-owners having those goods for the purpose of delivering them plaintiffs, it appears to me that the plaintiffs such a property and right of possession as to em to maintain trover against the defendants.

Rule discharged.

IAM THOMPSON *v.* JOHN JACKSON and JAMES FRANCIS GARNETT.

Nov. 25.

PASS, for breaking and entering a certain rtment of the plaintiff, used as, and being, a d parcel of a certain dwelling-house, situate staying and continuing therein for a long time, c., and seizing and taking divers goods and to wit, 2000 hats, &c. of the plaintiff, of a ue &c., and keeping and detaining part thereof commencement of the action, and converting ue thereof to the defendants' own use.

first, not guilty; secondly, as to the breaking, ring, and staying in the apartment, that the t was not, nor was any part of it, the property laintiff; thirdly, as to the residue of the tres- hat the goods and chattels were not, nor was

An assignment by an insolvent within three months before his imprisonment, in trust for creditors executing the deed, is, by the 1 & 2 *Vict. c.* 110. *s.* 57., void as against his assignees appointed under that statute, if made without a new consideration and without pressure.

of the trespasses stated in a declaration, the defendant pleads a justi- He also pleads to *all* the trespasses (*a*) payment of money into court, *mnificatus ultrà.* The plaintiff replies *damnificatus ultrà.* The jury dict for the defendant upon the justification, and for the plaintiff ges *ultrà.* Held, to be no objection to the verdict as to the 20*s.* that taken to apply, in part, to the trespasses justified.

(*a*) *Vide post,* 628.

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any part thereof, the goods and chattels or property of the plaintiff; fourthly, as to all the trespasses, leave, and licence; fifthly, also as to all the trespasses, payment of 40*s.* into court, and *non damnificatus ultrà*, in bar of the *further* maintenance of the action.

The replication joined issue upon the first three pleas, and traversed the leave and licence in the fourth plea, and in answer to the fifth, alleged further damnification; upon which last two replications, issue was joined.

At the trial before *Tindal* C. J., at the sittings at *Westminster*, after *Trinity* term 1840, the following facts appeared. On the 24th of *May* 1839, *Robert Hugh Franks*, a hatter, having a stock of goods upon premises occupied by him in *Finsbury Square*, executed an assignment of all his estate and effects to the plaintiff for the equal benefit of his creditors who should become parties to the deed. By this instrument *Franks* assigned to the plaintiff all his personal estate, except his leaseholds, in trust for such of the creditors as should execute the deed; and it empowered the plaintiff to carry on the trade for the benefit of the creditors; with a proviso that the release contained in the deed should be void in the event of *Franks*'s becoming bankrupt, or being discharged under any insolvent act. *Franks* and the plaintiff alone executed the deed. The plaintiff took possession of the shop in *Finsbury Square*, and the stock then found therein, and carried on the business, employing the same servants, and sending in fresh parcels of goods from his own stock, and from other persons. The business was regularly continued by the plaintiff from the execution of the assignment on the 24th of *May* 1839, until the month of *November* in the same year. *Franks* and his family continued to reside in the house, the furniture of which remained in his possession, and was under his control. *Franks* being arrested on the 24th of *June* 1839, obtained his discharge as an insolvent

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ɔursuant to the provisions of the 1 & 2 *Vict. c.* 110., hich the defendants were appointed assignees of te, on the 25th of *September* 1839. On the 4th *ber* 1839, the defendants, accompanied by an eer and his assistants, went to the premises, and an in possession, who took the money for every hat was sold in the shop from the 4th until the *October*; on the latter day the man was with- rom possession, and paid over to the plaintiff's n 18*l.*, out of 23*l.* received by him from the sale , retaining 5*l.* for sums paid by the defendants laintiff's shopmen for wages.

he defendants it was contended, that the assign- the 24th of *May* 1839 was fraudulent and void, non law, and also by the fifty-ninth section of 2 *Vict.* 110. (*a*)

s answered that there being no fraud *in fact*, gnment was not void at common law, and that -ninth section avoided only assignments to a par- reditor or particular creditors, and did not inva- deed of trust for the benefit of all the creditors.

(*a*) Which enacts "that if any prisoner shall, before or after his or her imprison- ment for being in insolvent cir- cumstances, voluntarily convey, assign, transfer, charge, de- liver, or make over, any estate, real or personal, security for money, bond, bill, note, money, chattels, goods, or effects what- soever, to any creditor or cre- ditors, or to any person or per- sons in trust for, or to or for the benefit, or advantage of such creditor or creditors, every such conveyance, assign- ment, transfer, charge, deli- very, or making over, shall be void, and is hereby de- clared, to be fraudulent and void as against the provisional assignee or other assignee or assignees of such prisoner, appointed under this act: Provided always, that no such conveyance, assign- ment, transfer, charge, deli- very, or making over, shall be so deemed fraudulent and void unless made within three months before the commence- ment of such imprisonment, or with the view or intention, by the party so conveying, assign- ing, transferring, charging, de- livering, or making over, of petitioning the said court for his discharge from custody under this act."

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The learned judge refused to stop the cause, but gave the defendants leave to move to enter a nonsuit in case it should become necessary. The jury returned a verdict generally for the plaintiff, and assessed the damages at 20*s.* beyond the 40*s.* paid into court.

Kelly having in *Trinity* term, 1840, obtained a rule nisi to enter a nonsuit pursuant to the leave reserved,

Talfourd and *Channell* Serjts. in *Easter* term last shewed cause, relying upon *Davies* v. *Acocks* (*a*), *Doe dem. Boydell* v. *Gillett* (*b*), *Mogg* v. *Baker* (*c*), and *Knight* v. *Fergusson.* (*d*)

Kelly and *Peacock*, in support of the rule, cited *Heath* v. *Milward* (*e*), *Isaac* v. *Belcher* (*g*), *Owen* v. *Body* (*h*), and *Binns* v. *Towsey* (*i*); on the last of which cases they mainly relied.

TINDAL C. J. now delivered the judgment of the court. After stating the pleadings (*k*), his lordship proceeded as follows: —

Upon the trial it was proved that one *Franks*, who carried on business as a hatter, being indebted to the plaintiff and to other persons, in *May* 1839 caused his creditors to be convened. Two meetings were held, at which one *Jones* attended for *Franks;* and at the request of *Franks*, and of several creditors, and by *Jones's* instructions, a deed of assignment was prepared, bearing date the 24th of *May* 1839, between *Franks* of the

(*a*) 2 *C. M. & R.* 461., 1 *Gale, Exch. Rep.* 251.
(*b*) 2 *C. M. & R.* 579.
(*c*) 4 *M. & W.* 348.
(*d*) 5 *M. & W.* 389.
(*e*) 2 *New Ca.* 98., 2 *Scott,* 160.
(*g*) 5 *M. & W.* 139., 7 *Dowl. P. C.* 516.
(*h*) 5 *A. & E.* 28., 6 *N. & M.* 448.
(*i*) 7 *A. & E.* 869., 3 *N. & P.* 88.
(*k*) *Vide ante*, 621.

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art, *Thompson* (the plaintiff) of the second part, e several creditors executing the deed of the part, whereby *Franks* assigned to *Thompson* all rsonal property (except his leasehold estates) in or the creditors who should execute the deed. eed contained a clause authorizing *Thompson* to n the trade for the benefit of the creditors, and proviso, that if *Franks* should either become pt or take the benefit of the insolvent act, the by the creditors should be void.

he time of executing this deed *Franks* resided rried on his business at No. 1. *Finsbury Square*, tenant of the premises from year to year under of *London*. After the assignment, *Franks* con- to reside at the house in *Finsbury Square*, but intiff *Thompson* sent a considerable quantity of into the shop, and the business of the shop was on, under his direction, by the same servants as en employed by *Franks*. *Thompson* never took ion of the furniture of *Franks* in the dwelling- nor was the deed executed by any of the cre-

he 24th of *June Franks* was arrested, and, having ed the insolvent debtors' court, was subsequently ged under the provisions of the insolvent debtors' he defendants having been appointed assignees of ate, on the 4th of *October* entered into the shop in *y Square* and took possession of the goods there, d a portion of them, but subsequently paid over plaintiff the price of such part of the goods sold nged to him, deducting, however, the charges of e.

erdict was found for the plaintiff; but leave was d to the defendant to move for a nonsuit, if the hould deem the acts done by the defendants to be justifiable; and the jury assessed the damages a

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the sum of 1*l.* beyond the amount of the money paid into court. A rule nisi was obtained, in pursuance of the leave reserved, to enter a nonsuit, on the ground that the deed of assignment to the plaintiff was void under the fifty-ninth section of the 1 & 2 *Vict. c.* 110., or, if not, that it was fraudulent and void at common law.

On shewing cause against the rule, it was insisted, that the deed was not to be considered as voluntary within the meaning of the statute, there being no sufficient proof that it was the voluntary act of *Franks*, and, even supposing it were voluntary on his part, still that he had transferred a legal possession of the shop to *Thompson*, and, therefore, that the assignees had no right to enter on the shop; and it was contended further, that the assignees had, at any rate, made out no answer to the action, as far as it related to the seizing of the goods.

By the statute 1 & 2 *Vict. c.* 110. s. 59. it is enacted, "that if any such prisoner (that is, any prisoner who shall have petitioned for his discharge) shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, &c. any estate, real or personal &c., to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of, any creditor or creditors, every such conveyance, assignment, &c. shall be deemed fraudulent and void as against the provisional or other assignee of such prisoner, appointed under the act." This clause is taken, without any substantial change, from the thirty-second section of the 7 *G.* 4. *c.* 57.; and the cases decided on that section are equally applicable to the 1 & 2 *Vict. c.* 110. *s.* 59.

The case of *Binns* v. *Towsey* (*a*) establishes that where a person in insolvent circumstances, after his im-

(*a*) 7 *A. & E.* 869., 3 *N. & P.* 88.

nent or within three months before his imprison-
ssigns over his property in trust for the creditors
all execute the deed, the assignment, if made
t new consideration or any application by credi-
to be deemed fraudulent and void against his
es. The case of *Davies* v. *Acocks* (*a*) is, indeed,
e degree at variance with *Binns* v. *Towsey*. In
se it was intimated, by some of the learned judges,
assignment for the benefit of *all* a man's cre-
could not be considered as fraudulent within the
second section of the 7 *G.* 4. *c.* 57. But the in-
in that case had only executed the assignment
severe pressure, and on that ground it was clear
e deed could not be considered as a voluntary
ance. The decision in *Davies* v. *Acocks* is there-
ite reconcilable with the other authorities on this
, though one of the *reasons* assigned is to be
ered as overruled by the subsequent case of
v. *Towsey*, which appears to us to rest on satis-
grounds.

he case now before us, *Franks*, being in insolvent
stances, made an assignment for the benefit of
of his creditors; and the only question is,
r he made it voluntarily, that is, whether he
t of his own proper motion, or on the suggestion
editor; and it appears to us, on the facts proved
trial, that the deed must be taken to be a volun-
ed; for it was by *Franks* that the creditors were
ed, and it was by his agent that instructions were
or drawing the deed; and, upon that account,
ed appears to us to be fraudulent and void, as
the assignees.

it is urged that, even if the deed be void, yet
, being tenant of the house and shop, had power

(*a*) 2 *C. M. & R.* 461., 1 *Gale, Exch. Rep.* 251.

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to underlet the shop to the plaintiff, and that he must be taken to have done so; and that such underlease will be good against his assignees. But it is to be observed, that after the execution of the deed of assignment, *Franks* and his family continued to occupy the house as before, the business of the shop being still carried on by *Thompson;* and it appears to us that *Thompson* is to be looked upon, not as having an interest as underlessee of the shop,—no agreement to that effect having been made,—but as a person using the shop for the purpose of carrying on the trade by the leave and licence of *Franks*, in whom the interest, as tenant, remained until it passed to the defendants, his assignees, who would consequently be well entitled to enter into the shop, and that, to that extent, the justification of the defendants is sufficient. But we are unable to see any ground on which the sale by the defendants of that portion of the goods in the shop which had been sent in by the plaintiff, and were his undisputed property, can be justified. No answer has been given to this part of the case. On the whole, therefore, we are of opinion that there is no ground for entering a nonsuit, but that a verdict should be entered for the defendants on the second issue, and that the verdict for the plaintiff on the other issues should stand.

It was objected, that if the shop were not the shop of the plaintiff, the 20*s.* damages must be considered as given, in part, for a trespass which is justified; but the jury having found their damages on the fifth issue, in which the defendants had paid money into court generally on all the trespasses in the declaration (*a*), and

(*a*) In *Easter* term, 1840, this case came before the court, upon a motion to discharge the rule to plead several matters,—on the ground that the fifth plea, which admitted that the action had been properly brought as to all the matters declared on, and that, up to the time of the delivery of the plea, it had been properly continued, and merely prayed that it

he issue whether more was due, we think the
ts are not at liberty to object to the finding of
as to the 20*s.*, because such finding is equally
with the issue which the defendants themselves
red.

Rule discharged.

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no longer prosecuted, sistent with the first h pleas, which denied plaintiff ever had any action; and with the lea, which denied a ction in respect of the house; and with the , which denied a right n respect of the goods. ing shewn, the court that the defendant ther confine his plea it to part of the action, aw it altogether. *Vide* l. I. 242. Notwithhis decision, the cause, d been in the *Middle*-paper for the sittings *ury* term, was tried in *Easter* vacation upon the record in an unaltered state; the consequence of which was, the somewhat incongruous finding adverted to in the conclusion of the judgment.

And see further, as to pleading payment *in barram ulterior. manutent. actionis*, *Rainbow* v. *Worrall*, 2 *Lutw.* 1174. 1177.; *Thomlinson* v. *Arriskin*, 1 *Com. Rep.* 328.; *Le Bret* v. *Papillon*, 4 *East*, 502.; *Harris* v. *James*, 9 *East*, 82.; *Kinnear* v. *Tarrant*, 15 *East*, 622.; *Lee* v. *Levy*, 4 *B. & C.* 390., 6 *Dowl. & R.* 475., 1 *Carr. & P.* 553. 675.; *Worswick* v. *Beswick*, 10 *B. & C.* 676., 5 *Mann. & R.* 586.

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Nov. 25.

NASH *v.* SWINBURNE.

A notice of trial given for the sittings in term is, by a mere oversight on the part of the defendant's attorney, supposed by him to be a notice for the sittings after term. Notice to produce is regularly served on the defendant's attorney, and the defendant is personally informed of the approaching trial.

TROVER, for 100 lbs. of sole-skins. Pleas: first, not guilty; secondly, plaintiff not possessed; thirdly, leave and licence. Replication, similiter to the first two pleas, and traverse of the leave and licence; on which issue was joined. On the 2d of *November*, the issue, with notice of trial for the first sittings in term, was delivered at the office of the defendant's attorney to his clerk. When the cause was called on upon the 12th of *November*, no one appeared for the defendant, and the plaintiff obtained a verdict for 23*l.*, after giving credit for 2*l.* 10*s.* for warehouse room, by way of recouper (*a*).

Talfourd Serjt., moved for a new trial on payment of costs, upon an affidavit of the defendant's clerk, who stated that upon being served with the notice of trial, he had mistaken it for a notice for the sittings *after* term; that under that impression he had on the 6th

No person appearing on the part of the defendant, the case is taken as an undefended cause, and a verdict found for the plaintiff. The court refused an application for a new trial, though moved for upon payment of costs.

An affidavit, made by the defendant's attorney's clerk, who swears that the defendant has been advised by counsel that he has a good defence to the action on the merits, which the deponent believes to be true, is not a sufficient affidavit of merits.

(*a*) In *Kist* v. *Atkinson*, 2 *Campb.* 63., a merchant having recovered damages against his factor for sending an article of a quality inferior to order, Lord *Ellenborough* held, that the latter could not maintain a cross action for his commission, as this claim might have been urged in reduction of damages in the former action. And see further as to recouper, 8 *Ass.* fo. 20. pl. 37.; *Bro. Abr.* tit. *Abridgment*, pl. 20.; *Ibid.* tit. *Assise*, pl. 140.; *Ibid.* tit. *Damages*, pl. 7. 94. 96. 99. 132.; *Ibid.* tit. *Emblements*, pl. 11.; *F. N. B.* 58 *H.*; 18 *Vin. Abr.* tit. *Rent*, (H. c.), pl. 2.; *Dyer*, 2. *b.*; *Nichols* v. *Philips*, 3 *Anst.* 636.; *Sherburn* v. *Siffkin*, 3 *Taunt.* 525.

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l the defendant that it was unnecessary to pre- trial at present, and that he did not discover ake until he was informed, on the 12th, that the d been tried. A rule nisi being granted,

T. *Wilde* Serjt., now shewed cause upon affi- tating, that on the 6th of *November*, the de- was personally informed that the trial would ce in the ensuing week, and that on the 10th ad been served on the defendant and his at- o produce certain documents at the trial, *at the ngs in term.* He submitted that this was a case of gligence on the part of the defendant's attorney's om which the plaintiff ought not to suffer. (The notice of trial which the defendant now pro- n consequence of being served with notice so to handed up to the court.) The notice is per- istinct and plain, and if the clerk omitted to forgot the contents, and the defendant has any injury, his remedy is against his attorney; . *Dick.* (*a*) Here, however, it does not appear defendant has sustained any injury. The affi- on which the rule was obtained, states that the nt had informed him, that he had been advised sel, that he has a good defence on the merits,— his eponent verily believes to be true. If the t were charged with having sworn falsely that as a good defence to the action, when in fact as none, it might be said, that he had only at his client had so informed him; *Breach* v. (*b*); *Gwilt* v. *Crawley.* (*c*) No ground has wn which fairly accounts for the mistake. The of the notice of trial so early as the 2d of *No-*

N. & M. 348. (*c*) 8 *Bingh.* 144., 1 *M. & Bingh.* 224., 4 *M. & Scott*, 229.

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vember, the communication with the d 6th, and the service of notice to produ ought to have drawn the attention of attorney to the real state of the cause.

Talfourd Serjt. in support of the ru application to the discretion of the cou fendant merely asks for a new trial u costs. (*a*) Unless the defendant and his have conspired together to present a the court, it is certain that the non-ap defendant at the trial was the result of attention on the part of the latter. T have arisen from the circumstance that for the sittings in term are usually ac debts, whereas this is an action of trove

TINDAL C. J. This case appears t distinguishable from that of *Briant* v. *C* a very gross case of negligence on the of the defendant's attorney to misunde of the notice of trial. After this, the 6th receives an intimation that the heard in the following week, and two day sitting the defendant and his attorney are notice to produce certain documents. negligence, there ought to be a very cle to induce the court to interfere. But merely that the deponent has been info fendant, that he has been advised by some statement which is not produc was a good defence on the merits, *whi* believes to be true. This may mean clerk believes that there is a good d

(*a*) The verdict was for 10*s*. only beyond the

but that he believes the defendant was so ad-
It does not even appear that the clerk had the
of knowing whether there was a defence on the
It is not said that he had the sole management
cause.

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other judges concurred.

Rule discharged.

URTON and Others to WARBURTON and Another.

Nov. 25.

FOURD Serjt. moved that the certificate of the
nowledgmemt of a deed of conveyance by *Mary*
aylor, wife of Captain *Taylor*, of the *East India*
ny's 48th regiment of infantry, taken at *Cud-*
in the presidency of *Madras*, might be filed of
pursuant to the 3 & 4 *W.* 4. *c.* 74.
commission to take the acknowledgment, was
to, amongst others, Lieutenant-Colonel *Leggett*
otain *Gordon*, and the acknowledgment was taken
ified by them. The affidavit verifying the cer-
was made in the ordinary form by Captain
and sworn before a magistrate of the name of
Iallett. The only difficulty in the case arose
second affidavit made by Captain *Gordon*, for
pose of shewing the authority of the magistrate
whom the first affidavit was sworn, and of ac-
g for the absence of a *notarial* certificate. The
affidavit was as follows: — *William Gordon*,

An affidavit, which alleged that the magistrate, before whom a prior affidavit annexed thereto, verifying the certificate of the acknowledgment of a deed by a married woman under the 3 & 4 *W.* 4. *c.* 74. had been sworn, and which sufficiently shewed the authority of the magistrate before whom the

avit was sworn, and accounted for the absence of a notarial certificate, not to be vitiated by its stating that the former affidavit was sworn by commissioner, it having been in fact sworn by the deponent himself.

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WARBURTON to WARBURTON.

Captain &c. maketh oath and saith, that
Lieutenant-Colonel of &c., on the 28t
1841, was sworn in the presence of this
truth of the affidavit hereunto annexed,
C. H. Hallett, Esq., and that the said *C.*
justice of the peace, and as such justice
administer oaths, and that the name
subscribed to the affidavit, and the nam
subscribed to the jurat thereof, are of
proper handwriting of the said *Joseph L*
Hallett, and were respectively signed
presence of this deponent. And this d
saith, that there is no notary public re
Cuddapah aforesaid than *Madras*, and t
made by this deponent, he does not beli
a notary public resident within fifty mil
aforesaid. The affidavit made in suppo
cation stated circumstances from whic
inferred that it was almost impossible
gether the parties who were present a
the acknowledgment.

It is submitted that the only mater
second affidavit are those which she
before whom the first affidavit was m
qualified to administer an oath, and whi
stances that will induce the court to di
certificate of a notary. The erroneous
the first affidavit had been sworn by Lie
Leggett, was a mistake in that which wa

TINDAL C. J. This was evidently a
The second affidavit was no doubt p
expectation that the affidavit verifying
would be sworn by Lieutenant-Colone
through some inadvertence, the languag
affidavit was not altered to meet the

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The second affidavit, however, as it stands, con- allegation that *Hallett*, before whom the former was sworn, was duly qualified to administer , and it sufficiently excuses the absence of a certificate. I think, therefore, we can see .

MAN and ERSKINE JJ. concurred.

E J. An allegation that *Leggett* had sworn, negative a swearing by the deponent himself.

Rule granted.

CHASE and Another *v.* GOBLE.

Nov. 25.

A rule absolute for a new trial, obtained in *Easter* term by the defendant, upon payment of costs, not having been served upon the plaintiff, the court, upon the application of the plaintiff in *Michaelmas* term, discharged the rule for a new trial.

was a feigned issue upon an interpleader rule which the now plaintiffs claimed, under three sale from one *Wheeler*, certain goods seized by riff of *Hants*, under a *fi. fa.* issued against by *Goble*, the now defendant. A verdict been found for the plaintiffs, the court, in erm last, made a rule absolute for a new trial, yment of costs. (*a*)

. *Wilde* Serjt., in this term, obtained a rule pon the defendant to shew cause, why the rule v trial should not be discharged, the defendant, repeatedly urged to do so, not having served absolute upon the plaintiffs.

ell Serjt. now shewed cause, upon an affidavit y the defendant's attorney which stated that

(*a*) *Vide antè*, Vol. II. 930.

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the property included in the bills o
Wheeler, the judgment debtor, to the
cause, had produced a sum sufficien
plaintiff's claim, independently of the
ture, which formed the subject matter
the interpleader rule, and that these fac
to the knowledge of the deponent du
term. The delay has been sufficientl
It would be useless to proceed to a
every prospect of the object of the interp
attained without it.

Sir *T. Wilde* Serjt., *contrà*. The e
insufficient. No reason has been she
was not served during the six months
between the granting of the rule absolut
term.

TINDAL C. J. The defendant had sh
excuse for not serving the rule.

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BRIDPORT *v.* JONES. *Nov.* 25.

NING Serjt., moved for a rule nisi, to com te principal and interest on a bill of exchange. nitted, that the affidavit upon which the appli- vas made, was sufficient, though it omitted to e amount of the bill, inasmuch as the particulars ill would appear by the pleadings in the action, h judgment had been signed.

In this court no affidavit is required in support of a motion for a rule nisi to compute principal and interest after interlocutory judgment.

AL C. J. The officer says that, in this court, no is necessary in order to obtain a rule nisi to .

Rule granted. (*a*)

(*a*) *de Longman* v. *Fenn*, . 541. In some of there referred to, the of the court was very asserted. Thus, in *Cros, M.* 14 *H.* 4, 6., after judgment for iff in replevin on de- he damages found on f inquiry were 30*s.*; s awarded by all the at the plaintiff should x marks (80*s.*), and objected that the da- und could not be en- e court said that they ard damages without ry, the inquiry being inform the court of ges. In *H.* 3 *H.* 6, fo. 29, pl. 13., *Martin J.* says, "When (in trespass) we say 'judgment for the plaintiff,' we can elect whether we will tax the damages by our discretion, and thereupon give judgment, or send a writ to the sheriff to inquire of the damages, &c.; and although the sheriff return the damages at a certain day, we can elect whether we will give judgmen upon it or enlarge or abridge the damages, and so vary from that inquisition, as in such a case the inquisition is merely of office for *non ligat neque solvit.*" And see *Roo* v. *Apsley*, 2 *Siderf.* 442.; *Holdipp* v. *Otway*, 2 *Saund.* 107.

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Nov. 25.

BAWDEN *v.* HOWELL

Where a promissory note is given to two members of a loan society, by name, to secure an advance made by the society, it is not necessary, in suing upon the note, to join the whole of the members of the society.

DEBT. The declaration was upo
note for 20*l.* made by the defen
24th of *October* 1839, and payable at t
date, to the plaintiff and one *Charles H*
ceased, or to their order.

Pleas: first, that the defendant di
said promissory note in the declaration
secondly, that before and at the time
the note, the plaintiffs were the truste
of a certain friendly benefit or loan
wit, The St. James's Joint Stock Loan
stituted and existing under and by vi
suance of (amongst other statutes in
friendly societies in *England* and *Wal*
of parliament, made and passed in a s
ment, holden in the fifth and sixth year
His late Majesty King *William* IV., in
for the establishment of loan societies
Wales, and to extend the provisions
societies' act to the Islands of *Guern*
Man," and that the said society, wher
were such trustees as aforesaid, just be
of the said note in the declaration me
on the 24th of *October* 1839, lent and
William Hilton at that one time, a cert
money, exceeding in amount the sum
say 20*l.*, contrary to the form of the sai
statute; that the defendant made the
delivered the same to the plaintiff and
on account of, and as a security to,
Frewin, as the trustees of and for and

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BAWDEN v. HOWELL.

ciety for the said sum of 20*l.* so lent and ad- by the said society to the said *William Hilton* as id, and that there never was any other consider- r value for his, the defendant's, making the said paying any part of the amount thereof. Verifi-

ication to the second plea: that the said note leclaration mentioned was not made, or delivered defendant to the plaintiffs, for or on account of, a security for, any amount lent or advanced by iety constituted or existing under, or by virtue ursuance of, the said act of parliament in the said plea in that behalf particularly mentioned, in and form as the defendant had above, in his cond plea in that behalf alleged: concluding to ntry.

he trial before the under-sheriff of *Middlesex*, in vacation last, it appeared that the promissory clared upon had been given to the payees, as stees of a loan society called The St. James's tock Loan Company, in order to secure the re- t of a sum of 20*l.* lent by the society to one *Hilton*. The society had not been inrolled he provisions of the 5 & 6 *W.* 4. *c.* 23.

s contended on the part of the defendant, that le of the members of the society, amounting to our, should have been joined as plaintiffs in the The under-sheriff having nonsuited the plaintiffs is objection,

T. Wilde Serjt., on a former day in this term, d a rule nisi for a new trial; against which

pas Serjt., now shewed cause. It is submitted, that as here, a business is carried on by two partners unt of the whole body, although a note be given

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to the two individually, all the members ship should join in the action. [*Tindal* any authority for that position? There i v. *Lye* (*a*), which is the converse.] Wh acting individually, gives a note, the firm upon it, although he chooses to apply the note to the purposes of the partner a partnership is carried on in the nam bers, all the partners must join in suin given to the two. [*Tindal* C. J. The c these trustees, was to enable them to s ing the other members of the society. *Rodie* (*b*), it was held, that where one ners, with the privity of the others, exchange in his own name upon the p in favour of persons who advance hi which he applies to the uses of the partn ners may be jointly sued, by the payees, [*Maule* J. So far as that case is applica thority against you; for Lord *Ellenboro* ment negatives the liability of all the par of the bills.] There is no difference bet arising upon a note and any other contra in *Skinner* v. *Stocks* (*c*), that the joi vessel engaged in the whale fishery, mi chaser for the price of whale oil, alth tract of sale was made by one of the pa the purchaser did not know that other p interest in the transaction. *Cothay* v. *T* the same effect. *Swan* v. *Steele* (*e*), sh mant partner may be liable on a bil [*Tindal* C. J. There, the partners tra name in which the indorsement was m

(*a*) 15 *East*, 7.
(*b*) 3 *Campb.* 493., *post*, 642. n.
(*c*) 4 *B. & Ald.* 437.
(*d*) 10 *B.*
(*e*) 7 *Eas* *Smith*, 199.

l that a dormant partner *must* join, although
nnot shew that his joining would in any degree
our defence to the action?] It is clear, that on
y contracts, a dormant partner may be sued with
ensible partner at election; and according to
Steele, the same rule extends to bills and notes.
C. J. It may be perfectly right, that a plaintiff
have power to make a party a defendant who
fited by the transaction. But it is a different
ion where a party is sought to be made out a
in order to turn the plaintiffs round.] A
nt may clearly, by the rules of pleading, take
ge of the non-joinder as plaintiff of a partner.
e of *Siffkin* v. *Walker*, where it was held, that
nissory note appear on the face of it, to be the
note of *A.* only, it cannot be declared on as
note of *A.* and *B.*, though given to secure a
which *A.* and *B.* were jointly liable, cannot
rted to the extent laid down.

Wilde contrà, was stopped by the court.

L C. J. It seems to me that the evidence
this case does not raise the objection that has
ed; for it was not shewn that the members
an society were trading as partners with the
nd under their names. If the note had been
the society, the objection would have arisen;
made to two individuals; and I cannot see
t principle we are to be called upon to hold,
whole of the members of the society should
joined as plaintiffs.

N J. I am far from saying that the objection
ave prevailed, even if it had been raised by
ce.

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MAULE J. The case is perfectly fr
It is a matter of every day occurrence
of unincorporated companies, to be t
manner in which the affairs of this societ
Policies of assurance are generally s
directors; and it has never been sug
whole of the company must sue and be
policies. The cases of *Denton* v. *Rodi*
v. *Shaftoe* (*b*), are in point.

(*a*) *Denton and Others* v. *Rodie and Another*, 3 *Campb.* 493., was a feigned issue, directed to try whether, at the time of the date and suing forth of a commission of bankruptcy against *J. H. Clough*, *J. S. Wilkes*, and *J. B. Clough*, those persons were indebted to the plaintiffs in any, and if any, in what sum of money. It appeared that *J. B. Clough*, with the privity of his partners *J. H. Clough* and *Wilkes*, drew bills in his own name on the partnership firm in favour of parties who advanced him the amount, whi
plied by him
partnership.

(*b*) 1 *Esp*
see *Lloyd*
Taunt. 324.
lett, *ibid.* 3
De La Cou
249.; *Matt*
Ves. & B. 12
Bank v. *Ca*
2 *Mann. &*
ex parte, *Bu*
Lewis, 1 *S*
diard, *ex par*
87.

END OF MICHAELMAS TER

MEMORANDA.

In *June* 1841 Sir *John Campbell*, Knigh
Attorney-General, was appointed Lord
of *Ireland*, and created a peer of the Un

Whereupon Sir *Thomas Wilde*, Knigh
Solicitor-General, was appointed Attorn

In *September* 1841 Sir *Frederick Poll*
reappointed Attorney-General, and Si
Follett, Knight, was reappointed Solicit

CASES

ARGUED AND DETERMINED

IN THE

RT OF EXCHEQUER CHAMBER

UPON WRITS OF ERROR FROM

THE COURT OF COMMON PLEAS,

IN

Michaelmas Vacation,

IN THE

TH YEAR OF THE REIGN OF VICTORIA.

1841.

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judges present were,—

Lord DENMAN C. J.

PARKE B.	WILLIAMS J.
ALDERSON B.	GURNEY B.
PATTESON J.	ROLFE B.

Affirmed in House of Lords

RNE and Others *v.* GATLIFFE, in Error. *Dec.* 9.

UMPSIT. First count, that the plaintiff below e defendant in error), on the 22d of *August* t the request of the defendants below (the

To a count in assumpsit — by *A.* against *B.*, upon a contract by

and securely to carry in a steam-vessel certain goods of *A.* from *Belfast* , and from *Dublin* to *London*, and to deliver the same at *London* to *A.* assigns, upon payment of freight,— assigning a breach in the non-deli-

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soever, excepted) unto the plaintiff (be
on payment, for the said goods, of cer
charges, with primage and average ac
thereupon, in consideration of the pren
said freight and reward, the defendan
promised to take care of, and safely and
and deliver, the said goods as aforesaid
the dangers &c., excepted); and that
fendants (below) then accepted and r
goods, of and from the plaintiff, for the
said, and although the last-mentioned st
wards, to wit, on the 28th of *August* in
said, safely arrived at *London* aforesai
goods on board thereof, and although n
gers and accidents so excepted as afo
vented the safe carriage and delivery o
or of any part thereof, and although a
for delivering the same had long before
ment of the suit, elapsed, and althou
(below) was always ready and willing
fendants (below) the said freight and
such primage and average as aforesai
premises the defendants (below) on &c.,
were then requested by the plaintiff (b
to him the said goods, and although
(below), in part performance of their p
to the plaintiff (below) at *London* afo
the said goods, to wit, one of the said
yet the defendants (below) did not n
time deliver the residue or any part
plaintiff (below); and the defendants (
lessly, negligently, and improperly c
selves with respect to the residue of
whilst they were in their custody for the
said, that for want of due care in the
low) and their servants, in that behalf,
afterwards to wit, on &c., became and

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e plaintiff (below). And by reason of the pre-
, the plaintiff (below) wholly lost and was de-
d of divers great gains and profits to a large
nt, to wit 200*l.*, which would otherwise have ac-
l to him, from the sale of the said residue of the
goods.

cond count, that the plaintiff (below) on the 22d of
st 1836, caused to be delivered to the defendants
w) at their request, certain other goods, to wit,
o be carried by the defendants (below), in a cer-
other steam-vessel of the defendants, called &c.,
Belfast aforesaid, to *Dublin* aforesaid, and there to
t *Dublin* aforesaid, to be reshipped into a certain
steam-vessel of the defendants (below) called &c.,
o be by them carried and conveyed in the last-
oned steam-vessel, from *Dublin* to *London*, and
to wit, at *London*, to be delivered in the like
order and condition as last aforesaid (all and
the dangers &c. excepted) unto the plaintiff
v) or his assigns, on payment for the last-men-
l goods, of certain freight and charges, with
ge and average accustomed; that thereupon, in
leration of the premises in that count mentioned,
lso in consideration that the plaintiff (below), at
equest of the defendants (below) on &c., employed
to take care of the last-mentioned goods at the
where they should be landed from the last-men-
l steam-vessel at the port of *London*, and to carry
me from such wharf to a certain place of business
e plaintiff (below), situate in *Ironmonger Lane* in
on, and to deliver the same to him at the said place
siness in a reasonable time in that behalf, after they
d be landed at such wharf as aforesaid, for other
d to the defendants (below) in that behalf, they
ised the plaintiff (below) to take care, as last afore-
of the last-mentioned goods at the wharf where

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they should be landed from the last-me
vessel at the port of *London*, and to ca
such wharf to the said place of business
(below), and there to deliver them to hi
able time in that behalf after they sho
landed at such wharf as aforesaid; and
the last-mentioned goods on the 28th o
arrived in safety in the last-mentioned
the port of *London* aforesaid, and were
at a certain wharf there, called *Fenning*
although the defendants (below), after su
wit, on &c., took the last-mentioned g
custody, and had the same in their possess
wharf, for the purpose of taking care of th
wharf, and carrying and delivering them
said; and although a reasonable time for
and delivering as last aforesaid, elapsed
commencement of the suit, and althoug
(below) had always been ready and willin
defendants (below) the last-mentioned fr
primage, and average, and the said ot
that count mentioned, according to the
last-mentioned employment; of all which
defendants (below) afterwards, to wit, on
and were then requested by the plaintiff
care of, and carry and deliver the last-m
according to their last-mentioned promis
fendants (below) did not nor would tal
carry, convey, or deliver to the plaintiff
said place of business or anywhere else,
tioned goods or any part thereof in su
time or at any time whatsoever, and wh
made default therein; and the defendant
conducted themselves so negligently, care
properly in the premises last aforesaid,
through their improper conduct in that b

oned goods became and were wholly lost to the iff (below); and by reason of the premises in that mentioned, he lost and was deprived of divers gains and profits to a large amount, to wit, 200*l.*, would otherwise have arisen and accrued to him sale of the last-mentioned goods.

e defendants (below) pleaded first, non assumpsit. ondly, to the first count, that after the arrival of the eam-vessel called the *William Fawcett*, at *London* he said goods on board thereof, and within a able time from such arrival, to wit, on the 29th *gust* 1836, they did, at the said port of *Lon-* deliver the said goods in the like good order ondition in which they were shipped according to said promise in that behalf, and that no part f was lost to the plaintiff (below) for want of re in them, or their servants in that behalf, *modo á*; concluding to the country.

rdly, to the first count, that the said steam-vessel the *William Fawcett*, was and is a vessel used and ed by the defendants (below) for the carriage of for freight from the port of *Dublin* to the port of *n*; that the goods in that count mentioned, were d and received on board the said steam-vessel at aforesaid, upon and under the terms and con- contained in a certain bill of lading, wherein it pressed that the said goods were to be delivered said port of *London*, in the like good order and on in which they were so shipped, (all and every ngers, &c. excepted) unto the plaintiff (below) or , on payment for the said goods, of freight and s as mentioned in the margin thereof, with pri- and average accustomed; that after the arrival last-mentioned steam-vessel at *London*, with the ods on board thereof, as in the said first count ned, to wit, on the said 29th of *August* 1836,

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the defendants (below) caused the said g
the part thereof in that count stated
delivered to the plaintiff (below), — to
therefrom, and safely and securely landed
in such like good order and condition
in and upon a certain wharf, called *F*
at the said port of *London*, there to re
same could be delivered to him, o
according to the tenor and effect of t
lading; the said wharf being a place a
conveyed by steam-vessels from the po
the port of *London*, were, on their arriv
mentioned port, used and accustomed to
deposited for the use of the consignees th
a place fit and proper for such purposes;
and whilst the said goods (except as a
deposited and remained upon the said
purposes aforesaid, and before a reas
the delivery thereof, according to the t
of the said bill of lading, had elapsed, to
and year last aforesaid, the same goods (
said) were, together with divers other g
upon the said wharf for the like purp
and destroyed by a fire which then happ
out by accident; by means whereof, and
cause, and without any carelessness o
improper conduct or want of due care in
(below) or their servants in that behalf,
(below) were hindered and prevented
the said goods (except as aforesaid)
(below) or his assigns. Verification.

Fourthly, to the first count, that a
vessel called the *William Fawcett*, had s
the port of *London*, with the said goods o
as in that count mentioned, to wit, on
of *August* 1836, the defendants (belo

y and willing to deliver the same to the plaintiff
w) or his assigns according to their said promise,
hat neither the plaintiff (below) or his assigns was
ere there ready to receive the same; whereupon
defendants (below) caused the said goods (except
part thereof in the first count stated to have been
ered to the plaintiff (below),) to be unshipped, and
y and securely landed and deposited in the same
order and condition in which they were delivered
e defendants (below), in and upon a certain wharf,
d *Fenning's Wharf*, within and at the said port of
lon, there to remain until the plaintiff (below) or
ssigns should come and receive the same, or until
ame could be conveyed and delivered to him or
ssigns, the said wharf being a place at which goods
eyed in steam-vessels from the port of *Dublin* to
ort of *London*, were, on their arrival at the last-
ioned port, used and accustomed to be landed and
sited, and being a place fit and proper, and con-
nt for that purpose; and that afterwards, and
t the said goods (except as aforesaid) were de-
ed, and remained upon the said wharf for the pur-
aforesaid, and before the plaintiff (below) or his
ns came or sent for the same, and before the de-
nts (below) were requested to deliver the same to
plaintiff (below) or his assigns, or a reasonable
for conveying them from the said wharf to the
tiff (below) or his assigns had elapsed, and before
ame could be removed therefrom, to wit, on the day
ear last aforesaid, the said goods and every part
of (except as aforesaid), were, together with divers
goods then being upon the said wharf for the
purposes, consumed and destroyed by a fire which
and there happened and broke out by accident,
without any negligence or improper conduct or
of due care in the defendants (below), or their ser-

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vants; and by means thereof, and from
the defendants (below) were hindered
from delivering the said goods (except
to the plaintiff (below) or his assigns. V

Fifthly, to the second count, that the
low) did not take the goods in that co
into their custody, nor had they the same
session at the wharf therein mentioned,
of taking care of them at the said wharf
conveying, or delivering them as therein
modo et formâ: concluding to the country

Sixthly, to the second count, that th
called the *William Fawcett* therein menti
is a vessel used and employed by the defe
for the conveyance of goods, for freight, fro
of *Dublin* to the port of *London*, and th
the second count mentioned, were shippe
on board the said steam vessel at *Dublin*
and under the terms and conditions cont
tain bill of lading, wherein it was expr
said goods were to be delivered at th
London in the like good order and cond
they were so shipped (all and every th
excepted), unto the plaintiff (below) or
for the said goods freight and charges as m
margin thereof, with primage and averag
that after the arrival of the last-mentione
at *London*, with the said goods on board
the second count mentioned, and after
had been safely landed upon the said wh
also mentioned, the defendants (below) ca
to be safely deposited and stored upon
until they could be carried therefrom
to the plaintiff (below), the said wha
time and then being a place wherein g
in steam-vessels from *Dublin* aforesaid

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on were, on their arrival at the last-mentioned port, and accustomed to be landed and deposited for ustody until they could be carried therefrom and ered to the consignees thereof, and a place fit and r for such purposes, and that the defendants (below) ke care of the said goods and merchandise whilst remained and were stored and deposited upon the wharf for the purpose last aforesaid, from the time e said landing thereof, until afterwards and whilst continued so stored and deposited, and before they be carried from the said wharf, and before a nable time for their being so carried or for the ry thereof to the plaintiff (below) had elapsed, to n the 30th of *August* in the year last aforesaid, the goods, and every part thereof, were, together with other goods then being upon the said wharf for the urposes, casually consumed and destroyed by a hich then happened and broke out by accident; eans whereof and from no other cause, and without arelessness, negligence, or improper conduct, or of due care in the defendants (below), they were red and prevented from delivering the said goods plaintiff (below). Verification.

e plaintiff (below) joined issue on the first, second, fth pleas, and demurred specially to the third and pleas, and generally to the sixth.

e causes of demurrer assigned as to the third plea that it confessed that the goods were not delivered ding to the bill of lading or according to the promise first count mentioned, and yet it did not state any excuse for such non-delivery; that it amounted to gumentative denial of the allegations, in the first of non-delivery and negligence, and yet it did not y traverse the said allegations, or either of them; concluded with a verification instead of conclud- the country; that it amounted to an informal

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vants; and by means thereof, and from
the defendants (below) were hindered
from delivering the said goods (except
to the plaintiff (below) or his assigns. V

Fifthly, to the second count, that the
low) did not take the goods in that co
into their custody, nor had they the same
session at the wharf therein mentioned,
of taking care of them at the said wharf
conveying, or delivering them as therein
modo et formâ: concluding to the country

Sixthly, to the second count, that th
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is a vessel used and employed by the defe
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of *Dublin* to the port of *London*, and th
the second count mentioned, were shippe
on board the said steam vessel at *Dublin*
and under the terms and conditions cont
tain bill of lading, wherein it was expr
said goods were to be delivered at th
London in the like good order and cond
they were so shipped (all and every th
excepted), unto the plaintiff (below) or
for the said goods freight and charges as m
margin thereof, with primage and averag
that after the arrival of the last-mentione
at *London*, with the said goods on board
the second count mentioned, and after
had been safely landed upon the said wh
also mentioned, the defendants (below) ca
to be safely deposited and stored upon
until they could be carried therefrom
to the plaintiff (below), the said wha
time and then being a place wherein g
in steam-vessels from *Dublin* aforesaid

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on were, on their arrival at the last-mentioned port, and accustomed to be landed and deposited for ustody until they could be carried therefrom and red to the consignees thereof, and a place fit and r for such purposes, and that the defendants (below) ke care of the said goods and merchandise whilst emained and were stored and deposited upon the harf for the purpose last aforesaid, from the time said landing thereof, until afterwards and whilst continued so stored and deposited, and before they be carried from the said wharf, and before a nable time for their being so carried or for the ry thereof to the plaintiff (below) had elapsed, to n the 30th of *August* in the year last aforesaid, the goods, and every part thereof, were, together with other goods then being upon the said wharf for the urposes, casually consumed and destroyed by a hich then happened and broke out by accident; ans whereof and from no other cause, and without arelessness, negligence, or improper conduct, or of due care in the defendants (below), they were ed and prevented from delivering the said goods plaintiff (below). Verification.

e plaintiff (below) joined issue on the first, second, fth pleas, and demurred specially to the third and pleas, and generally to the sixth.

e causes of demurrer assigned as to the third plea that it confessed that the goods were not delivered ing to the bill of lading or according to the promise first count mentioned, and yet it did not state any xcuse for such non-delivery; that it amounted to umentative denial of the allegations, in the first of non-delivery and negligence, and yet it did not y traverse the said allegations, or either of them; concluded with a verification instead of conclud- the country; that it amounted to an informal

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traverse of the breaches alleged in the fi
it was uncertain whether the meaning of
goods were delivered or were not deliv
were meant that the goods were not de
plaintiff (below), no legal excuse for suc
was alleged, and if it were meant that t
delivered, the non-delivery alleged in
ought to have been traversed, and the
case should have concluded to the cou
plea was repugnant, inasmuch as, in o
mitted that the goods were not delivere
the tenor of the bill of lading, and yet
it set up as a defence the depositing o
place being a proper and usual place
goods for the use of the consignees ther
were any defence, amounted to an allega
very to the plaintiff (below), according to
ing; that the plea was double, inasmuch
ants (below) attempted thereby to set up
and an excuse for non-delivery, and so
both in denial, and in confession and avo

The causes of demurrer assigned as
plea were: that the said fourth plea neith
versed, nor confessed and avoided, the al
first count; that it disclosed no sufficient
non-delivery by the defendants (below)
proper conduct alleged in the first cou
admitted the same; that it did not shew
tiff (below) was bound, or that it was
ready to receive the goods when the defe
were ready and willing to deliver them
the plea, or at any other time, or th
(below) was bound to come or send, or
come or sent, for the same; that it did
the plea that the defendants (below) ga
(below) any notice of the arrival of th
or of the goods, or that he had any notic

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eir being ready and willing to deliver the goods, or
ie knew where to send for or to receive the same;
t does not appear by the plea that the defendants
w) ever offered to deliver the goods to the plain-
elow), or tendered them, or required him to re-
or to send for them; that it is admitted that the
, except the part delivered, remained in the hands
e defendants (below) for the purpose of delivering
under the bailment mentioned in the first count,
et no sufficient excuse is stated for not delivering
and no answer is given to the first count, inas-
as carriers are liable for loss by fire, though the
be accidental; that the plea amounts to an in-
l and argumentative denial of the failure to de-
lleged in the first count, which should have con-
l to the country, and which is also, in that case,
or not directly traversing the allegation of a failure
iver, and for stating matter inconsistent with the
tions in the first count, without distinctly travers-
ie same, as it admits the failure to deliver, and
not answer the same, or give any legal excuse or
for the same; that the plea confesses that a rea-
e time for the delivering to the plaintiff (below)
ot arrived, and that the goods (except as afore-
were not delivered, and states, in answer, merely
ie goods were burnt whilst in their hands under
ilment in the first count mentioned; that it con-
with a verification, whereas it ought to have con-
to the country; that it does not appear distinctly
plea whether the residue of the goods was or was
livered, and whether the same was or was not in
nds of the defendants (below) in pursuance of the
nt mentioned in the first count; that the plea, in
art, excuses the non-delivery, by shewing argu-
ively that it was occasioned by the default of the
F (below) in not being ready to receive the goods,

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and in another part thereof states facts to sh
had been a delivery and a determination of
and that the defendants had not the goods
session for the purposes of the said bailm
no longer answerable as carriers, nor lia
sponsibility to which carriers are by la
respect of the residue of the goods at th
loss and of the fire in the plea mentione
plea is double in setting up the two last
fences, and is repugnant in so doing, ina
same are inconsistent; that the plea is dou
tifarious in setting up many different def
the default of the plaintiff in not bein
landing and storing on a wharf alleged
place in that behalf, the supposed fire a
of negligence in the defendants, and by
premises last aforesaid, it is repugnant, in
said four defences are inconsistent with
that the defendants give no answer in t
much of the first count as alleges that t
conducted themselves so carelessly, negli
properly with respect to the residue of th
the same were lost to the plaintiff, althou
to answer the whole of the first count; th
no answer to the first count, except the
therein alleged, and being pleaded to the w
altogether, by reason of its being no answe

The court of Common Pleas, in *Hilar*
gave judgment for the plaintiffs on each
murrers, holding the third and fourth pl
because they omitted to shew that a re
had elapsed after the ship's arrival, an
landing of the goods, to enable the plaintif
receive his goods from alongside the vesse
landing of the goods in the manner alleg

by the custom or practice of the port of *London*; is to the sixth plea, holding that the loss of the by fire at the wharf, afforded no excuse for their elivery, the defendants (below) acting, during the of the time the goods were in their possession, the obligation of common carriers, and not being d with one degree of responsibility whilst taking f the goods at the wharf, and with a different de- f responsibility whilst carrying the goods from the ; both these duties forming part of the same ex- contract, and being to be paid for by the same d. (*a*)

e issues in fact were tried before *Tindal* C. J., at ttings in *London* after *Hilary* term, 1838.

the part of the plaintiff (below), admissions were , whereby it was agreed that it should be admitted he defendants (below), in 1834 and 1835, were, and thence down to the commencement of the action, ontinued to be, members of, and co-partners in, e Dublin and London Steam-marine Company,"— no objection should be taken for the non-joinder her parties as defendants, — that the company's for freight and charges were in the form an- to the admissions (*b*),— that the several packages oned in the two bills of lading (*c*), were marked tively with the letters and numbers as in the bills ling mentioned, and bore no other mark, name, ion or address, — that such packages contained oods mentioned in the invoices, and consignment- nts therein referred to, (which invoices and ac- were to be taken as evidence of the contents lue of the packages mentioned in those bills of), — that such goods were the property of the

4 *New Cases*, 314., 5 667.

(*b*) See the form, *post*, 661.
(*c*) See *post*, 658.

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plaintiff (below), and were of the agg
780*l.* 8*s.* 7*d.*

The goods, for the non-delivery whe
was brought, were shipped at *Belfast*,
gust 1836, on board the *City of Lon*
vessel, mentioned in the following bills

"Shipped, in good order and con
Charley, on board the *City of London*
master for the present voyage, now
Belfast, and bound for *Dublin*, and t
shipped per *William Fawcett*, *G. Bro*

Freight.			Charges.		
£	*s.*	*d.*	*s.*	*d.*	
1	7	8	2	0	*S. G.* 60. 63. Four boxes linen from Messrs. *T. Bennett* and Co.
	13	7	1	0	*S. G.* 64. 65. Two boxes linen from Messrs. *T. Bennett* and Co.
	11	5	1	0	*S. G. L.* 160. One bale linen from Messrs. *J. R.* & *T. Richardson.*
	11	5		6	*S. G. L.* 5. One box linen from Mr. *H. Atkinson*, jun.
2	6	1	1	6	*S. G.* 57. 58. One box and one bale linen from Mr. *C. Woods.*
5	10	2	6	6	

London, bei
numbered a
be delivere
good order
the aforesaid
(all and ev
and acciden
steam-navig
nature and
cepted), un
Gatliffe or
ing for the said goods freight and charge
with primage and average accustomed.

"In witness whereof, the master or a
vessel hath affirmed to three bills of lad
tenor and date; one of which bills being
the others to stand void.

"*Belfast*, *August* 22d 1836.

"Contents unknown to

"For *Hill*

"*W. H. Ki*

[The second bill of lading, which w
date, was for *S. G.*—4 & 5. Two boxes

lfast, on board the same vessel, for the same
e by *Lawson Annesley*, deliverable to *S. Gatliffe* or
s, on paying freight for the said goods — 16*s.* 3*d.*,
ere — with primage and average accustomed, and
, *R. Grüber.*"] (*a*)

e goods mentioned in these bills of lading (except
ox delivered to the plaintiff (below), as mentioned
declaration), were landed by the defendants (be-
pon *Fenning's Wharf*, *without notice to the plaintiff*
), between eleven in the morning and four in the
oon of *Monday* the 29th of *August*, the ship having
d on the day before at two in the afternoon, and
reported at the *Custom House* between ten and a
r past ten on the *Monday* morning, at which
they were consumed by an accidental fire on the
of the same 29th of *August*.

e *Thorpe*, who had been clerk to the plaintiff
) for twelve years, proved that he was an Irish-
merchant, carrying on business in *Ironmonger*
Cheapside, and, in the course of his business,
ntly (in the years 1833, 1834, 1835, and 1836),
ng consignments of linen from *Ireland*, which ge-
came by vessels of the Dublin and London Steam-
Company, and were delivered by that company, —
ch consignments always came under bills of lading,
in some cases, arrived by post, — that the goods
onsigned were delivered at the door of the ware-
of the plaintiff (below), from the company, and
ch was, *with one exception*, the invariable course,
after the goods were delivered the plaintiff (below)

(*a*) The cause of action out of the shipment of ls mentioned in the se- ll of lading, was, by nt of the parties, given in evidence in the present action, notwithstanding the declaration contained no count applicable to these goods.

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received a printed bill (*a*) for the freigh
which were usually settled once a month.
identified one of these bills, dated the
1835, relating to a former dealing bet
pany and the plaintiff (below), which bi
by stating that the charges paid at *Be*
paid to one *Hill Charley*, the freight a
the company, who would also receive the
charges for lighterage, wharfage, cartage

The counsel for the plaintiff (below) pr
bill for freight and charges should be re
and likewise proposed to give in evidence
bill, for freight and charges, and other
relating, not to any of the goods in q
cause, but to other goods alleged to h
veyed by the company on former occasio
for the plaintiff, and to prove, by th
Thorpe, and by other parol evidence, the
the goods so alleged to have been co
company, on former occasions, from *I*
plaintiff (below) had been delivered to hi
pany.

On the part of the defendants (below)
that the evidence so proposed to be given
sible, inasmuch as (among other reason
contract by bill of lading could not be
varied, or qualified by any parol evide
and it was farther insisted, that the ev
given by *Thorpe*, so far as it related
dealings and transactions between the pa
inadmissible, and ought to be struck out
mitted to the jury.

His lordship was of opinion, that the
dered, and likewise that already given,

(*a*) See the form, *post*, 662.

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d to the former dealings and transactions between arties, was admissible, not to superadd any con- to, or in any manner varying, or altering the n contract, but simply for the purpose of ascer- g the course and usage of delivery in the port of *on*. To this ruling, the counsel for the defendants w) excepted.

orpe, having produced and proved the documents jected to, proceeded to state one instance in the goods were not carted home by the com- which goods had been brought from *Belfast* by *Villiam Fawcett*, under a bill of lading dated the *December* 1835, signed "for *Hill Charley* agent, *Jackson*," (being one of those already produced dence), and having thereon the marks "*S. J. L.*" meant "*Samuel Gatliffe, London*," such being the which goods that came by bills of lading to the iff (below), were usually marked; that, in this in- , the witness went to the wharf of the company in *Smithfield*, to ascertain the cause of the delay in elivery of the goods, and was told by persons there, he wharf being very full, those goods had been l at *Fenning's Wharf*; that in consequence of this nation, the witness went to *Fenning's Wharf*, and ld that the goods had been searched for and could found, but that he, *Thorpe*, upon searching for found the goods there himself, and having ob- an order, from the people of *Fenning's Wharf*, for elivery of them, he procured a cart and had them yed therein from that wharf to the warehouse of laintiff (below); that he did not remember any instance in which the goods were landed at *Fen- Wharf*, or not carted home; that he was not aware reason for their not being carted home on that on, except the company's wharf being full, and

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that the company delivered the followin
and charges, being in the same form
one of those before produced.

" Weekly conveyance to *Dublin, Fal*
mouth, by the powerful steam-vessels *S*
City of Londonderry, and *William Faw*
tons, and 160 horse-power, and the *R*
tons, and 220 horse-power.

" No. 16. *John Street,*

" *Decemb*

" No. 476 | 109.

" Mr. *S. Gatliffe,*

" Dr. to the Dublin and London Ste

" For freight and charges per *Willia*
Belfast.

Marks.	Nos.	Goods.	
S. G. *L.*	118. 120. 11. 12.	1 box 3 packs.	Freight - Primage - Charges paid at *Bel* Lighterage, wharfag and entry

" *December* 19th 1835, settled by che

" *T. F. Ladbury.*"

" Goods not taken away within three
ing (or sent home and refused), are
expense and risk of the consignees.
considered as liens not only for the frei
thereon, but for all previously unpa
charges due by the consignee. Clai
will not be allowed, unless written no
the day of delivery, to Mr. *W. J. Smith*
John Street, or to the Dublin and Lond
pany's Wharf, *Lower East Smithfield.*"

Thorpe further stated, that the amoun
in the above bill was originally 2*l.* 4*s.*

afterwards reduced by 3*s.*, on account of the goods
ng been carted away in this instance by the wit-
, that of the goods in the bills of lading (*a*) only one
marked *S. G.* 61. had been received by the plaintiff
ow), and that no bill for freight and charges had
delivered for the same; that such box was de-
ed from a cart in which it was brought to the ware-
se of the plaintiff (below) from the Dublin and Lon-
Steam Company's wharf at *East Smithfield*; that the
ess had, before such delivery, been at the company's
rf at *EastSmithfield* to inquire after these goods, which
iry he had been led to make in consequence of his
ng heard that some linens had been landed and burnt
enning's Wharf; that he made those inquiries at the
rf at *East Smithfield*, of the foreman there, who told
in answer thereto, that some of the linens of the
ntiff (below) had been landed at *Fenning's Wharf*,
that there were some in the vessel that had not been
n out, but that he did not at that time obtain any of
n. Upon cross-examination *Thorpe* stated, that he
not know, of his own knowledge, whether the goods
tioned in the several bills of lading (before produced
him and read in evidence), were landed at the com-
y's wharf or at *Fenning's Wharf*; that the plaintiff
ow) had, in some instances, shipped goods by the
pany's vessels, the *City of Londonderry*, and the *Wil-*
Fawcett, in which goods were conveyed from *Belfast*
the plaintiff (below), which, on their arrival in the
t of *London*, were landed at the company's wharf in
t Smithfield; that it was the practice to send the
ds home as soon as they were landed, principally in
company's carts, and in other carts employed by
. *Smith*, who was the company's agent at the office
London.

On cross-examination *Ladbury* stated, that the goods

(*a*) *Antè*, p. 658.

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which came by the company's vessels from *Ireland*, were generally landed at the company's wharf at *East Smithfield*, but that the company sometimes sent the goods to other wharfs — to *Fenning's Wharf*, to *Wright's Wharf*, and, on one occasion, to *Miller's Wharf*; that *Fenning's Wharf* was equally convenient for the landing of the goods, as far as regarded the owners of the goods, as the company's own wharf, if the owners were aware of the place of landing; but not so convenient for the company on account of the distance of lightering; that if goods had come directed to a person with whom the company had no previous dealing, it would have been just as convenient to land them at *Fenning's Wharf*, as at the wharf of the company; that persons for whom goods had been consigned did not usually make an application for them at the wharf, but that they had often done so; that he could not say whether or not the plaintiff had ever made such an application; that it had often happened that goods arrived by the company's vessels in *London*, consigned to persons who had had no previous dealings with the company, and that such persons had made applications at the company's wharfs or offices for their goods; that goods had frequently arrived in *London* by the company's vessels with no direction upon them to any particular place, in which cases the goods were always landed on the company's wharf, where they remained until they were called for by a person who could produce a receipt (not a bill of lading), given for them at the place of shipment, without the production of which the goods would not be delivered. This witness identified the receipt, which was in the following form: —

"Dublin and London Steam-marine Company's Office.
"17. *Eden Quay, Dublin.*
"30th *November* 1836.

"Received to be shipped per *Liverpool* steamer,

e packet directed to Mrs. *Cobbett*, which we engage have delivered to the consignee's order at the dis- arging berth of the said vessel (all and every the ngers, &c. excepted), upon freight being paid for e same. Contents unknown.

" N. B. It will be necessary to produce this receipt the agent of the said vessels at the port of destin- on."

Ladbury further stated, that it was usual to land ods arriving by steam-vessels in *London*, as quickly possible, on the wharf, and that as soon as the cargo s discharged and another put on board, the vessels re sent off again, and that if they arrived on *Sunday*, e cargo would probably be all landed by *Tuesday* at on.

Upon his re-examination, *Ladbury* stated, that *Fen- g's Wharf* was a general wharf, and that the wharf *East Smithfield*, was exclusively the company's wharf; t the consignees of goods conveyed by the com- ny would go for the purpose of inquiring after their ods, either to the office of the company in *John Street*, to the wharf at *East Smithfield*; that it was usual, some instances, to give receipts when bills of lading the goods had been signed; that Mrs. *Cobbett*'s goods re to be delivered at the discharging berth; that discharging berth of this vessel mentioned in the d receipt, in the port of *London*, was off *East Lane irs*, where the goods would be deliverable without ng landed or wharfed; that the goods were some- es landed from the vessel in the stream, and were o sometimes taken on board in the port of *London* exportation, from lighters employed by the owners the goods, in which case the form of the receipt was ferent; and that when the direction upon the pack- es of goods was sufficiently certain to enable the

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servants of the company to deliver them, it was the constant course to deliver them, by sending them home by carts, and to charge for so sending; and if they could not find out where to send them, to keep them till called for.

James Gray, an officer in the custom-house, proved, that the steam-vessel called the *William Fawcett*, in the declaration mentioned, was reported inwards on *Monday* the 29th of *August* 1836, and that she could not be reported before ten o'clock in the morning of that day, but that he could not say at what hour she was reported; nor whether any portion of the goods on board had been landed before the report.

The case for the plaintiff (below) being closed, the defendants (below) proved an admission, whereby it was agreed between the attorneys on both sides, that it should be admitted at the trial, that such notice or notices as should be proved to have been given by or on behalf of the Dublin and London Steam-marine Company to the plaintiff (below), should be considered as a notice or notices to him from the defendants (below).

They then gave in evidence an order of *Bosanquet* J. of the 7th of *January* 1837, and a rule of court made thereon, whereby the defendants (below) were debarred from pleading specially the following matters, — the plaintiff (below) agreeing that they might be given in evidence under non assumpsit, — viz., first, that before the goods were delivered to the defendants (below) they gave notice to the plaintiff (below), that they would not be responsible for goods exceeding the value of 5*l.*, and that they would not be responsible for loss by fire.

The defendants (below) then put in the several receipts that had been produced by *Thorpe* on his cross-examination, one of which was read as follows:

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"Conveyance of passengers, goods, parcels, &c. twice a week to *Plymouth*, *Falmouth*, and *Dublin*, and once a week to *Belfast*, by the Dublin and London Steam-marine Company's steam-ships, *Shannon* and *Thames*.

"13th *August* 1836.

Chief Office, 16. *John Street*, *Crutched Friars.*	West End Office, 33. *Regent Circus*, *Piccadilly.*	Wharf, *Lower East Smithfield*, (adjoining *St. Katharine's Dock*), to which carriages, horses, cumbrous or heavy goods, are requested to be sent.	
	Union Street, *Article*, 1 piece or box	Consignee.	Where.
		Hill Charley	*Belfast.*

"Received, as above, one package, to be forwarded by the company's steam conveyance, and for which —— has been paid to me for cartage, sufferance, and wharfage.

"Signed, *H. Godby.*"

The depositions of *Hill Charley* and of *Richard Grüber* his clerk, taken under a commission, were then put in. Their tendency was, to shew that *Hill Charley* acted as a shipping agent at *Belfast*, and had been in the habit of receiving goods for shipment on board the company's vessels, and of giving receipts and signing bills of lading for them, and that he had signed the bills of lading for the goods in question, and that receipts and bills of lading so signed by him or his clerks, had always been recognised and acted upon by the company, who paid him a commission for his trouble.

George Brooks proved, that he was the master of the *William Fawcett* in *August* 1836, and had been such master for two years and a half before that time, occasionally commanding other vessels belonging to the Dublin and London Steam-marine Company; that the *William Fawcett* sailed from *Dublin* on the 24th of *August* 1836, having the goods on board marked *S. G.* for Mr. *Gatliffe* of *London*, under bills of lading, and arrived at *London*, on *Sunday* the 28th of *August*, at

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two o'clock in the afternoon, and was then moored at her usual discharging berth off *East Lane Stairs*, and was reported inwards at the custom-house on the following morning between ten o'clock and a quarter past; that the cargo was not discharged at the company's wharf at *East Smithfield*, in consequence of that wharf being overladen with export goods, but was taken out of the ship at *East Lane Stairs*, and put in lighters which came from *Fenning's Wharf*; that the cargoes of the company's vessels were usually discharged on their wharf at *East Smithfield*, but when that wharf was overladen, at other wharfs, as well *Fenning's Wharf* as others; that *Fenning's Wharf* was on the opposite side of the river from the company's wharf, close to *London Bridge*, and nearer thereto than any of the others, and was as convenient a place for the discharge of goods of this description as the *East Smithfield Wharf* or any other, and that entire cargoes of the company's vessels and other steam-vessels were repeatedly landed at *Fenning's Wharf*; that it was always an object with the masters and owners of steam-vessels to land the cargo as soon as practicable, and that when there is no room at one wharf they go to another; that the vessel *William Fawcett* was not taken alongside *Fenning's Wharf*, but discharged her cargo into lighters at *East Lane Stairs*, in which lighters the goods were conveyed thence to the wharf; that during the time the witness had commanded in different vessels of the company, he had received great quantities of goods under bills of lading for various consignees in *London*, and that, generally, they came with their own lighters, and took two-thirds of the cargo from the ship's side on production of the bill of lading and payment of freight, the rest of the cargo being taken to the company's wharf if there was room for it, if not, to any of the other wharfs before mentioned; and that, in his opinion,

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when he had done that, he, as commander of the vessel, had nothing further to do with the goods.

The witness further stated, that he had commanded ships in various trades, and had been accustomed to the sea for twenty-six years, and had brought cargoes from different ports to *London*, under bills of lading making the goods deliverable at the port of *London*; that the course in such cases, upon the arrival of the ship in *London*, was, to go into a dock, and the dock company landed the goods over the vessel's side there, and then the master had nothing further to do with them; and that when the consignees came to the ship's side with their bills of lading, he delivered the goods on production of the bill of lading and payment of freight; and if the vessel did not go into dock, and the consignees did not come for the goods to the ship's discharging berth, the master would hire lighters to take the goods from the vessel, and would land them at either of the docks, or at some legal quay or sufferance wharf; that when the witness had commanded vessels in which he had received different parcels of goods for different consignees under bills of lading, he did not, on his arrival in *London*, give any notice to the consignees, but they came with their bills of lading (forwarded to them by the shippers abroad) to receive their goods; and that in all cases when he had discharged the goods, either at the ship's side, or in the dock, or at a wharf, he took no further concern about them; that *Fenning's Wharf* was a capacious wharf, having warehouses attached to it, and was in a good situation for the immediate conveyance of goods to different parts of *London*, and that it was, to the best of the witness's judgment, a fit and convenient wharf for the landing of goods of the description of those in question.

On his cross-examination *Brooks* stated, that he left the *William Fawcett* about four o'clock on the *Sunday*

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afternoon, and returned on board at nine o'clock on the following morning, when he found the company's people discharging the cargo into lighters alongside; that he remained on board about a quarter of an hour, and then went to the custom-house; that the manifest is sent by post to the agents of the company at *London*, and that a copy is sent on board; that goods were sometimes delivered without the freight being paid, in which case a bill for the freight was sent afterwards, but that goods were very seldom delivered at the ship's side without the bills of lading being produced, except to particular person; that linen and provisions brought by the company's vessels, generally came to the same houses from time to time; that, with respect to foreign vessels, the custom in clearing the ship was, for every merchant to enter his own goods, and pay the duties, either himself or through a broker; that there was generally a broker to act for foreign ships, to whom the ship's manifest was delivered, and that, as far as the witness knew, the broker sent round to different persons to say that there were goods on board to clear, and that, in the case of the *Irish* vessels, the entry is made by the owner or master of the ship only.

Several other witnesses called on the part of the defendants (below), proving that the whole of the goods mentioned in the bills of lading (*a*) (with the exception of one box of linen in the declaration stated to have been delivered to the plaintiff (below)), were unshipped from the *William Fawcett*, between seven in the morning and two in the afternoon of the 29th of *August* 1836, and conveyed, in lighters, direct to *Fenning's Wharf*, and there safely landed between one and five in the afternoon of the same day, and that the whole of such goods so landed, were, during the following night,

(*a*) *Antè*, p. 658.

there consumed, together with the warehouses and great quantities of other merchandise therein, by an accidental fire, and that if the bills of lading had been presented before the goods were destroyed, they would have been delivered; that *Fenning's Wharf* was as fit and convenient a wharf for the landing of goods of the description of those consigned to the plaintiff (below) by the *William Fawcett*, as any on the banks of the river, and is much resorted to by steam and other vessels engaged in bringing merchandize of all sorts from *Ireland* to *London*, and that the *William Fawcett* and other vessels belonging to the company had, on many previous occasions discharged their cargoes at *Fenning's Wharf*, it being the practice of the company to send their vessels there, or to some other wharf that might be equally convenient, whenever their own wharf was full; that when the goods were landed at *Fenning's Wharf*, or at any other than the company's own wharf, it was the usual course for the wharfinger to deliver them on the bills of lading being produced by the consignees, and in some cases, where the addresses of the consignees were known, to cart them from the wharf at which they were landed, to their warehouses, and that the company made no charge for lighterage, wharfage, cartage, and entry, when the goods were landed at any other wharf than their own; that when goods were landed at the company's own wharf, and the consignees came themselves with their bills of lading or other documents and took away the goods, they were charged for lighterage and landing only; that it sometimes happened that goods were not sent for for some days, when they were warehoused, and then, upon delivery, a charge was made for warehouse-room, and that it sometimes also happened, that the company sent home the goods, and then, but not otherwise, a further charge was made for cartage, and that the plaintiff (below) had,

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several times during a period of nine months previous to *August* 1836, sent to the wharf at *East Smithfield* to inquire whether any goods brought by the company's steamers belonging to him had been landed, and requesting an early delivery of such goods.

The defendants (below) then called several brokers and shipping agents to prove the usage in the port of *London*, as to the unshipment and delivery of goods consigned under bills of lading similar to those in question. These witnesses stated that it was the custom and practice, in the case of sailing vessels, to deliver goods brought under such bills of lading, either at wharfs or docks within the port of *London*, or into lighters sent by the consignee alongside the ship; that if the consignee did not come, or send his own lighters, for them, the goods were conveyed from the ship, in lighters employed by the ship's broker, to a wharf or dock, according to the nature of the article, and there deposited with the wharfinger or with the officer of the dock-company, together with the bills of lading, which would give the wharfinger or the dock-company the same information respecting the goods which the master or the ship's broker possessed; that when no particular wharf was expressed in the bill of lading, the master went to any wharf he pleased, provided it was a place which suited the particular trade, and there landed the goods; that *Fenning's Wharf* was a fit and convenient place within the port of *London* for the landing of goods of the description of those in question. It was also stated, that in the *Leith* and *London* trade, where goods arrive in the port of *London* under bills of lading similar to those held by the plaintiff (below), the usual course, in the case of sailing vessels, is, to unship the goods alongside the wharf, and, in the case of steam-vessels, to unload into lighters in the stream, and land the goods at the wharf belonging to the steam-company, or, under

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particular circumstances, elsewhere; and that the goods were usually delivered at the place of business of the consignee, if known, otherwise they were stored until claimed.

On cross-examination these witnesses stated, that the custom and practice alluded to, with respect to sailing vessels, related principally to *foreign* ships; that when the broker knows the consignees, he, generally, for the sake of dispatch, sends round to them an intimation of the ship's arrival; and that it is usual to insert in bills of lading a note specifying the time within which the goods are to be taken out of the vessel upon her arrival, which time, particularly in the case of steam-vessels, is within twenty-fours after the ship is reported.

On re-examination they stated, that where goods are shipped under a general bill of lading, the usage is, not to send goods to the warehouse or place of business of the consignee, but to land them at some dock or wharf, the consignee, to whom a duplicate bill of lading is always transmitted, having the same means of writing the time of the arrival of the vessel as the ship's broker has.

Smith, a Custom-house officer, also stated that steam-vessels are permitted to break bulk before they are reported inwards. The witness went on board the steam-vessel, *William Fawcett*, at nine o'clock on the morning of the 29th of *August* 1836, when he found that the unloading had commenced, and allowed it to proceed, though no entry had been made.

On the part of the defendants (below) it was insisted that the delivery of the goods at *Fenning's Wharf*, the said wharf being a fit and convenient place within the port of *London* for that purpose, was a good and sufficient delivery of such goods, within the terms of the bill of lading in the first count mentioned, and a performance of the contract therein contained, and that the several matters

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so produced and given in evidence as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence, to entitle the defendants to a verdict, and to bar the plaintiff (below) of his action, and, if not, then that the Lord Chief Justice ought to direct the jury that a delivery of the goods mentioned in the bills of lading upon *Fenning's Wharf* was, in point of law, a sufficient delivery under, and accomplishment of, the terms thereof, and discharged the defendants (below) from all further responsibility for the goods thereunder, and that no contract could, as was proposed on the part of the plaintiff (below), be inferred from the usage alleged to have subsisted between the parties, so as to vary, or superadd to, the written contracts expressed in the bills of lading, or in any manner to increase or extend the obligation thereby imposed on the defendants (below); that if the goods, after being landed at *Fenning's Wharf*, could be considered as still in the hands of the defendants, they were then in their hands as *warehousemen* only, and not as *carriers* or ship-owners, under the bills of lading or otherwise, and that they were therefore not liable for the loss arising from an accidental fire; and his lordship was prayed so to direct the jury.

The Lord Chief Justice told the jury, that the question raised by the pleadings on the first count of the declaration, viz., whether there had been a delivery of the goods in that count mentioned, was a question for their consideration, and that they were to say, whether, upon the whole of the evidence laid before them on both sides, a delivery at *Fenning's Wharf*, of goods shipped under the bills of lading given in evidence, was a delivery according to the usage and practice of delivering goods observed in the port of *London*; that if the jury, upon consideration of the evidence, were of opinion that the delivery at *Fenning's Wharf* was not a delivery under such bills of lading, according to such

usage and practice, then they were to find their verdict for the plaintiff (below), for the amount of damages sustained by him; but that if they thought the delivery at *Fenning's Wharf was* a delivery under the bills of lading according to the usage and practice observed in the port of *London*, then they were to find their verdict, as to the first count, for the defendants (below).

Whereupon the counsel for the defendants (below) excepted to the said charge and direction to the jury, and insisted upon the said several matters and proof as an absolute bar to the action, and that the Lord Chief Justice ought to have directed the jury in the manner above, in that behalf prayed on the part of the defendants.

The jury returned a verdict for the plaintiff (below) upon the first count, damages 780*l.* 8*s.* 7*d.*, and they were discharged, by consent (*a*), from giving any verdict as to issues raised on the second count.

The record being brought by writ of error to this court, the case was argued, on the 15th of *February* 1841, by

Kelly (with whom were *Swann* and *J. W. Smith*), for the plaintiffs in error. With respect to the demurrers to the pleas, the objections in point of form resolve themselves into this — that the third and fourth pleas do not allege a delivery of the goods in express terms, but only amount to an argumentative denial of the averments of non-delivery and negligence contained in the first count of the declaration. It is submitted that these pleas are correct in point of form, and that they shew that the legal operation of the facts set forth in the first count does not establish the breach of duty

(*a*) As to the necessity of consent, *vide Hick* v. *Keats*, 4 *B. & C.* 69., 6 *D. & R.* 68.; *Dibben* v. *Marquess of Anglesey*, 2 *Cro. & M.* 722. 746., 4 *Tyrwh.* 926.; *Drewett* v. *Sheard*, 7 *Carr. & P.* 465.; *Green's Assignee* v. *Earl of Listowell*, 2 *Brady, Adair, & Moore's Irish Law Rep.* 384.

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alleged in that count. In *Chitty on Pleading*, 528., 6th ed., it is laid down, in treating of implied colour, that, "Where the cause of action is avoided by matter of *ex post facto*, as payment, accord, and satisfaction, &c., it may always be specially pleaded. So, where the defence consists of matter of law, where in other words the mere facts charged in the declaration are admitted, and their legal operation is disputed by matter alleged in the plea, the defendant need not plead the general issue, and the plea may be special. In this case, from the nature of the defence, the plaintiffs has an implied colour of action, bad indeed, in point of law, if the facts pleaded be true, but which is properly referred to the decision of the court. Thus, in assumpsit the defendants may specially plead infancy, lunacy, or coverture when the contract was made, or illegality of consideration, as usury, or gaming, or that the engagement was void, as not being in writing, according to the statute of frauds. So, a plea in assumpsit for goods sold; that they were sold by *A.* as the plaintiffs agent; that the agent sold them as his own, with the plaintiff's privity, and that the defendants was not aware of the real facts, and shewing a debt from the agent as a set-off is good; for this matter operates as a legal extinguishment of a debt not otherwise denied." The question will turn, after all, upon whether the pleas are good in substance. The declaration is substantially on a bill of lading, by which the defendants (below), having received goods belonging to the plaintiff (below), on board of their vessel, undertook to carry them to the port of *London*, and deliver them there to the plaintiff (below), or his assigns. The undertaking is one that is well known to the commercial law of *England*. The plaintiff (below) alleges, by way of breach, that the defendants (below) did not deliver the goods; but by reason of their negligence the goods were lost. The defendants (below), in the third plea,

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admit the receipt of the goods, and state that on the arrival of such goods in the port of *London* they caused them to be deposited in *Fenning's Wharf*, there to remain until they could be delivered to the plaintiff (below), or his assigns, according to the bill of lading, where, and before a reasonable time had elapsed for their delivery, the goods were accidentally destroyed by fire. The question is, whether this plea is not a complete answer in point of law. The first point is, whether, supposing the defendants (below) retained possession of the goods, in what character they were held after being landed. If they had been burnt on board of the vessel, the defendants (below) would have held them merely as carriers, and, though liable at common law, would have been protected by the 26 *G.* 3. *c.* 86. *s.* 2. If the court should be of opinion that the undertaking of the defendants below was not satisfied by landing the goods at a place where the plaintiff below might have sent for them, it is submitted that the moment the voyage was ended, — although the defendants (below) might, to a certain extent, be liable for the safe custody of the goods — they no longer held them as carriers, but as wharfingers, warehousemen, or agents, and would not be liable for the loss of the goods by fire, unless that happened by negligence, which is denied by the plea. To entitle the plaintiff (below) to recover, it must be contended, either that the defendants (below) were bound to deliver the goods at the plaintiff's abode or place of business, or to wait, with the goods on board their ship, until he should send for them. If it were held that the master of a general ship, with goods on board belonging to fifty different consignees, was bound to forward the goods to the residences or places of business of the consignees, the law would impose on him an obligation which he could not possibly perform. For, even supposing he knew where the consignees were to

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be found, he would not know whether the various bills of lading had not been assigned. With respect to the other proposition, is the master bound to keep the goods on board until the consignee shall send for them? and, if so, how long is he to wait? By not landing the goods he is increasing the underwriters' risk; and it is apprehended that it is his duty on his arrival to unload the goods immediately, and so put an end to the voyage and the risk. If the consignee does not at once send for the goods, they must either be retained on board or landed at some wharf. [*Alderson* B. A third case may be put—that the master was bound to wait a reasonable time before he landed the goods.] It is stated in the pleas that the goods were landed and burnt before a reasonable time for their delivery had elapsed, therefore no question can arise as to the reasonableness of the time. [Lord *Denman* C. J. The question, whether the master, after waiting a reasonable time, may land the goods, does not arise on this record; for the pleas do not state that the goods remained a reasonable time on board before they were landed at the wharf.] It is contended that the master was not bound to wait at all. If, indeed, the plaintiff below had sent to the ship's side for the goods, then the master might have been bound to deliver them; but it appears from the record, by necessary implication, that the plaintiffs did not do so. [*Patteson* J. All that appears from the plea is, that the goods were not demanded before they were landed; they may have been landed the moment that the vessel arrived.] The fourth plea alleges that the defendants (below) were ready to deliver the goods if they had been demanded. If the master were bound to wait a reasonable time before landing the goods, it would be found very inconvenient, if not impracticable. Supposing different goods to be stowed away in different parts of the vessel, it would be

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almost impossible to deliver to each consignee his goods in the order in which they were stowed away; for the consignee whose goods are undermost may come first and demand them; and in that case what is to be done with the upper goods if they may not be landed? No authority can be found for the position that it is the duty of the master to wait any time in order that consignees may come and demand their goods. On the other hand, a consignee on receiving a bill of lading is bound to watch the arrival of the ship, and he is not entitled to notice; *Harman* v. *Clarke* (*a*); *Harman* v. *Mant.* (*b*) Supposing the rule to be, that the master is bound to wait a reasonable time, is that a question of law or of fact? The court could not decide without knowing the size of the ship and the nature of the cargo, and the manner in which it is stowed; for each case would depend upon its own peculiar circumstances. [*Alderson* B. Would it not be a question of fact?] If it formed any part of the mercantile law that the master was bound to wait, the question would have frequently arisen. [*Patteson* J. It is you who raise a point of law; for by the bill of lading you are to deliver the goods in the port of *London*. You say that you have delivered them at this wharf, and call upon us to say that you have delivered them according to the contract.] Supposing that not to amount to a delivery, do not the circumstances here excuse the non-delivery? If the goods had been burnt on board, the ship-owners would have been protected, as already observed, by the 26 G. 3. c. 86. s. 2. [*Alderson* B. The arrival of the vessel is known to the ship-owner, but not to the consignee; and he must have a reasonable time to become acquainted with it. *Harman* v. *Clarke* seems to shew that the question of reasonable time enters into the con-

(*a*) 4 *Campb.* 159. (*b*) *Ib.* 161.

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tract.] *Leer* v. *Yates* (*a*) is a strong case to shew the inconvenience of goods remaining on board of a general ship; and none can arise from the goods being landed at a proper wharf. In *Abbott on Shipping*, 246., 5th ed. (*b*), the duty of the master, on the voyage being completed, is thus laid down: "When the ship has arrived at the place of her destination, the master must take care that she be safely moored or anchored, and report his ship and crew, and deliver his manifest and other papers, to the proper officers, according to the law and custom of the place, and without delay deliver the cargo to the merchant or his consignees upon production of the bills of lading and payment of the freight and other charges due in respect of it; and he has no right to detain the goods for wharfage if the consignees tender the freight, and require them to be delivered over the ship's side; *Bishop* v. *Ware* (*c*); and if, by the terms of the charter-party, a particular number of days is stipulated for, the delivery, either generally or by way of demurrage, he must wait the appointed time for that purpose." *Bishop* v. *Ware* seems to imply that the goods may be landed; for the question there was, not the right to land them, but to charge the expenses of the wharfage. And it is said, p. 248.: "In *England* the practice is, to send such goods as are not required to be landed at any particular dock, to a public wharf, and order the wharfinger not to part with them till the freight and other charges are paid, if the master is doubtful of the payment." In that passage landing at a public wharf is spoken of as the ordinary practice. It is further laid down, p. 249.: "The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of particular

(*a*) 3 *Taunt.* 387.
(*b*) See 6th ed. 331.
(*c*) 3 *Campb.* 360.

places, and the usage of particular trades. Thus a hoyman who brings goods from an out-port into the port of *London* is not discharged by landing them at the usual wharf, but is bound to take care and send them out by land to the place of consignment. And if the consignee require to have the goods delivered to himself, and direct the master not to land them on a wharf at *London*, the master must obey the request; for the wharfinger has no legal right to insist upon the goods being landed at his wharf, although the vessel be moored against it. But in the case of ships coming from a foreign country, *delivery at a wharf in* London *discharges the master.*" It seems to be assumed throughout the whole treatise that the goods may be landed: and the learned author, in defining the duty of the master, nowhere suggests that the goods must be kept on board of the vessel for any period whatever. *Hyde* v. *The Trent and Mersey Navigation Company* (*a*), which was cited by the other side upon the argument below, is distinguishable from the present case. But there Lord *Kenyon*, speaking of the general liability of carriers, says, "If the defendants here be liable, consider how far the liability of carriers will be extended; it will affect the owners of ships bringing goods from foreign countries to merchants in *London*: are they bound to carry the goods to the warehouses of the merchants here, or will they not have discharged their duty on landing them at the wharf to which they generally come? It would be strange indeed if the owners of a *West Indiaman* were held liable for any accident that happened to goods brought by them to *England*, after having landed them at their usual wharf." And *Buller* J. says, "When goods are brought here from foreign countries, they are brought

(*a*) 5 *T. R.* 389.

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under a bill of lading, which is merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of carrying the goods on land; and according to the established course of trade, a delivery on the usual wharf, is such a delivery as will discharge the carrier." And *Grose* J. observes, "The case of foreign goods brought to this country, depends on the custom of the trade, of which the persons engaged in it are supposed to be cognizant: *by the general custom the liability of ship carriers is at an end when the goods are landed at the usual wharf.*" It cannot be objected here that *Fenning's Wharf* was not a proper and an usual place for landing the goods; and it is submitted, that on their being landed the liability of the defendants below as carriers ceased, and they held the goods merely as wharfingers or warehousemen. By the bill of lading, the goods are deliverable on payment of freight, and it is apprehended that on the goods being landed the voyage was complete, and the freight became payable; *Mashiter* v. *Buller.* (*a*) [*Patteson* J. I do not know that it makes any difference, but by the bill of lading the goods are deliverable on payment of "certain freights and *charges*," which may mean cartage.] The more probable inference is, that it means wharfage and other expenses attending the landing of the goods. *Roskell* v. *Waterhouse* (*b*), and *Garside* v. *The Trent and Mersey Navigation Company* (*c*), shew the distinction which exists between the two characters of carriers and warehousemen.

Supposing the master to be bound by law to keep the goods on board for a recognized time, the ground of complaint would be that he has not so kept them. This, however, is not an action for landing the goods before a reasonable time, but for the non-delivery of the goods; and it is

(*a*) 1 *Campb.* 84.
(*b*) 2 *Stark. N. P. C.* 461.
(*c*) 4 *T. R.* 581.

shewn that before there was a complete delivery, the goods were lost under circumstances which relieve the defendants below from liability. If a consignee is entitled to receive the goods directly from the vessel, it can only be on the ground of avoiding any increased charges. That, however, will not deprive the master of the right to land the goods, allowing the consignee to take them, paying the same charges as if he had received them in the river.

With respect to the bill of exceptions, it was sought at the trial by the plaintiff below, to engraft terms on the bill of lading arising out of the previous course of dealing between the parties, in order to shew that the delivery mentioned in the bill of lading meant a delivery at the plaintiff's place of business. The evidence was rejected for that purpose, but was admitted to prove the custom of the port of *London*. It is submitted that it was not admissible for the latter purpose. And, in reality, the evidence was not given to shew the meaning of the instrument in all cases, but only as between these parties; and no authority can be adduced that a practice existing between two individuals is admissible to shew the meaning of a contract entered into by them. The ground of the admissibility of evidence to shew the usage of particular trades is, that the words have, among all persons engaged in such trades, a recognised meaning. [*Parke* B. You must begin to prove a custom by particular instances.] Supposing that this bill of lading had been assigned, would it then have borne a different meaning from what it would have done in the hands of the consignee? And if the assignee had demanded the goods at the vessel's side, could the master have refused, stating that he would only deliver the goods at *Ironmonger Lane?* If it be said that the word "delivery" is ambiguous—that it may mean either delivery at the ship's side, or at the consignee's place of

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business, although that may let in general evidence of the custom, it does not render the course of dealing between the parties admissible. *Blackett* v. *The Royal Exchange Assurance Company* (*a*), *Smith* v. *Wilson* (*b*), and other cases shew that when such evidence is admitted, it is to establish a general usage or evidence of a custom in a particular trade or at a particular place. [*Alderson* B. If you seek to qualify the meaning of a word by usage, may not the other party prove that you did not act upon the usage? May not his answer be either that there is no such usage, or that you did not act upon it?] There is no pretence for saying that the evidence was offered to prove any general usage, or that under a general bill of lading, the shipowner is bound to deliver the goods at the warehouse of the consignee. It is obvious that the evidence was intended, not to prove any general usage, but the reverse. [*Parke* B. It is impossible to say that the evidence was not admissible, in order to shew what was the custom, or to shew that the parties in their dealing had not acted upon it. The evidence was, no doubt, admissible upon the ground put by *Tindal* C. J.—for the purpose of ascertaining the course of usage and delivery in the port of *London*. *Patteson* J. The exception taken is not — that the evidence, although it may have been admissible to prove the custom, did not tend to establish it.]

With regard to the summing up two distinct objections arise; the one, as to the statement that landing the goods at the wharf satisfied the bill of lading, and the other, as to the statement that the defendants were not liable for the destruction of the goods by fire, inasmuch as they did not hold them as carriers. With respect to the first point, it is quite consistent with the right of the consignee to come to the ship's side and

(*a*) 2 *Tyrwh.* 266., 2 *C. & J.* 244. (*b*) 3 *B. & Ad.* 728.

demand the goods, that a delivery at a proper wharf was a delivery within the meaning of the bill of lading. No such demand was made, and no point was urged at the trial that the goods were landed before a reasonable time had elapsed for the making of a demand; and, in point of fact, no instance was shewn of a delivery of goods at the ship's side. If the goods had been stolen on the wharf, the defendants (below) would not have been liable, neither would they have been responsible for the wharfage. Even supposing, that from any previous course of dealing, or from any other cause, the plaintiff (below) was not bound to send for his goods, but that it was the duty of the defendants (below) to land them and to forward them to him, although the defendants (below) might still have the custody of the goods, they held them no longer as common carriers but as warehousemen, and the Lord Chief Justice ought to have directed the jury that they were not responsible in that character for the loss which had occurred.

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Cresswell, (with whom were *Stephen* Serjt. and *Crompton*,) *contrà*, was stopped by the court, it being intimated that if the court thought it necessary, they would hear him on a future day.

Cur. adv. vult.

Dec. 6.

The court on this day informed *Cresswell* that the only point on which they thought the court of Common Pleas wrong, was with respect to the demurrer to the plea to the second count, and asked him if the plaintiff (below) was willing to strike out that count; or, if not, whether it was thought important to endeavour to support the judgment upon that count, which only involved a question of costs. *Cresswell* declining to press for judgment upon the second count, the judgment of the court upon the other question was now delivered by

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Lord DENMAN C. J. The court has to decide in this case, whether the court of Common Pleas were right in giving judgment for the plaintiff (below) on the demurrers to two pleas to the first count of the declaration, and to one to the second; and also whether the exceptions to the opinion of the lord chief justice on the trial of the issues ought to be allowed. We think our judgment should be in favour of the plaintiff below, who is the defendant in error, except as to the demurrer to the plea to the second count.

The declaration is in assumpsit. The first count states the delivery to the defendants (below) of certain goods to be carried by them in a steam-vessel from *Dublin* to *London*, and there delivered (all and every the dangers and accidents of the seas, steam-navigation, &c. excepted), to the plaintiff (below) or his assigns; and the breach assigned is, the non-delivery in *London*. The second count is on a promise — in consideration of the previous delivery to be carried to *London* for freight, and of the employment of the defendants by the plaintiff for other reward, — to take care of the goods at the wharf where they should be landed from the steam-boat, and to carry the same from the wharf to the plaintiff's place of business, and to deliver the same in a reasonable time; and the non-delivery is alleged as a breach.

To the first count is a plea, that the goods were put on board under a bill of lading, by which they were made deliverable to the plaintiff (below) or his assigns on payment of freight; that after the arrival of the goods, the defendants (below) caused them to be deposited on *Fenning's Wharf*, there to remain until they could be delivered to the plaintiff (below), that wharf being a place at which goods conveyed by steam-vessels from *Dublin* to *London*, were used and accustomed to be landed and deposited for the consignees thereof, and a place fit and proper for that purpose; and that afterwards, and before a reason-

able time for the delivery thereof, according to the bill of lading, the goods were destroyed by an accidental fire. Another plea (the fourth) stated that, after the arrival of the ship and goods, the defendants were ready and willing to deliver to the plaintiff or his assigns; but neither the plaintiff or his assigns were then ready to receive the same, and that the goods were thereupon deposited on *Fenning's Wharf* (with the same averment of the place being usual, fit, and proper), and that they were destroyed there by an accidental fire before the defendants had been requested to deliver the same, or a reasonable time had elapsed for that purpose.

These are the pleas to the first count.

Another plea (the sixth) to the second count states, that the defendants took care of the goods whilst they were at the wharf; and that whilst they continued there, and before a reasonable time had elapsed for their delivery, the goods were destroyed by fire; and that without any negligence, improper conduct, or want of due care in the defendants, they were prevented from delivering the goods to the plaintiff.

To the third and fourth pleas there were special demurrers, and to the sixth a general demurrer; and upon argument, the judgment was in favour of the plaintiff, not on any of the grounds of special demurrer, but on the merits.

We are all of opinion that the two pleas to the first count are bad in substance; because they do not state either a delivery to the consignee or his assigns, or that a delivery to *Fenning's Wharf* was a delivery to them, according to the usage of the port of *London* with respect to goods on such a voyage; and if, as the goods were deliverable to the plaintiff or his assigns, the defendants were not bound to deliver until they had notice that the plaintiff or some assignee would receive, or until the party entitled should come to receive them,

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still the defendants were bound to keep the goods on board (or on the wharf at their own risk), for a reasonable time, to enable the consignee or his assigns to come and fetch them, and they continued liable until such reasonable time had elapsed. The defendants could not at once discharge themselves from all responsibility under the bill of lading by immediately landing the goods, and that without any notice to the consignee. But both those pleas are defective in substance, in not averring that a reasonable time for the plaintiff to come and receive the goods had elapsed when the goods were landed, or when they were destroyed; nor is any notice to the consignee stated; nor, though it is pleaded that the defendants were ready and willing to deliver, is it alleged that notice of that readiness was given to the plaintiff. It is quite consistent with the averments in these pleas, that the moment the steam vessel arrived, the goods were landed before the consignees had notice of the arrival, or any opportunity of receiving the goods from the ship's side. For these reasons we concur entirely with the judgment of the court of Common Pleas, on the demurrer to the pleas to the first count.

As to the plea to the second count, we do not think that the judgment was correct, though whether it was correct or not is of small importance, as the plaintiff will ultimately succeed on the first count. It appears to have proceeded upon the supposition that taking the second count altogether, the duty to carry *from* the wharf, was of the same character as that to carry *to* it, and that such obligation was that of *common* carriers, who are responsible for an accidental fire. But we do think either, that the contract to carry from the wharf for other reward was of the like nature as that to carry to it, or that the latter was a contract by the defendants as *common carriers*. It is no where averred that they were so; and the contract to carry to *London* is no

more than an engagement to carry the goods of the plaintiff, to a particular ship. And if the defendants were not subject to the liability of common carriers whilst the goods were in the warehouse, all that they were bound to do by the contract as alleged in the second count, was, to take reasonable care of the goods there, and the plea which states that they did so, and that the loss did not happen from the want of such care, is good. We think, therefore, that the judgment on the demurrer to the plea to the second count should have been for the defendants, and that the judgment in that respect should be reversed.

It remains to consider, whether the exceptions to the ruling of the Lord Chief Justice ought to prevail. Upon this part of the case we are confined to the simple question, whether the exceptions were well founded or not. The first of these was, that evidence (written and parol) of former dealings between the same parties as to the carriage of goods from the wharf to the plaintiff's place of business was not admissible. The Lord Chief Justice held, that it was,—for the purpose of ascertaining the course and usage of delivery in the port of *London*. And we are of the same opinion; for they are instances tending to prove the non-existence of the custom set up by the defendants. This exception therefore is unfounded.

The next exception was, to the direction of the Lord Chief Justice to the jury, and was of a two-fold character; first, that he declined to tell the jury that a delivery at *Fenning's Wharf* was in point of law a sufficient delivery, and discharged the defendants from all responsibility, and further, that he declined to tell them that no contract could be inferred from the course of dealing to vary or superadd to the written contract in the bill of lading, and further, that he ought to have told them, that if the goods landed on the wharf were

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still in the defendants' hands, they were in their hands as warehousemen only, and not as carriers, and that the matters given in evidence were conclusive in favour of the defendants. And the second objection to the direction was, that it was wrong to tell the jury that the question raised by the pleadings to the first count,—whether there had been a delivery of the goods—was a question for their consideration, and that the jury were to say, whether upon the whole of the evidence, a delivery at *Fenning's Wharf* of goods shipped under the bill of lading was a delivery according to the usage and practice of delivering goods observed in the port of *London;* that if they were of opinion, that it was not a delivery according to such usage and practice, they were to find their verdict for the plaintiff, if not, they were to find their verdict on the first count for the defendants.

The direction of the Lord Chief Justice appears to us to have been perfectly correct as to the issue on the delivery in the first count; and all question (if there ever was any) as to the propriety of the direction so far as it related to the second count, is put an end to by the course pursued by discharging the jury as to the issue on that count. The delivery at *Fenning's Wharf* was certainly not a delivery under the bill of lading, unless the usage and practice in the port of *London* made it so. We are clearly of opinion, that this objection ought not to prevail. Therefore the judgment is affirmed with that exception.

Judgment accordingly.

MEMORANDUM.

In this vacation Mr. Justice *Bosanquet* resigned his seat as one of the judges of this court, to which he had been appointed in *Hilary* term, 1830.

END OF MICHAELMAS VACATION.

CASES

1842.

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term,

IN THE

FIFTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banc during this term were,

TINDAL C. J. — ERSKINE J.
COLTMAN J. — MAULE J.

IVATT *v.* MANN.

Jan. 15.

Upon the trial of a feigned issue to try whether *A.* is entitled for

FEIGNED issue, to try whether the plaintiff was, for and in respect of a certain freehold estate called, at this day, the *Manor Farm*, consisting of 160 acres of and in respect of *Blackacre*, to a separate right of *feeding* and *folding* an *unlimited* number of sheep over certain open fields and commons, it appeared that *A.* had a *right of common* over such open fields and commons in respect of sheep *levant and couchant* upon *Blackacre*. Held, that the evidence negatived the unlimited right claimed, and that the verdict was properly found for the defendant, notwithstanding the rules of *H. T.* 4 *W.* 4., which were held not to apply to cases of feigned issues.

It appearing that the claim put in by the plaintiff before the commissioner was in the form in which it had been stated in the issue, and that his claim in respect of *Blackacre* had been admitted by the commissioner, the court discharged a rule — for referring it to the master to amend the issue, and for a new trial to be had upon the issue so amended.

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freehold land, and 122 acres of copyhold land, within and parcel of the manor of *Rampton Lyles*, and of all the freehold land which formerly belonged to the *Manor Farm*, entitled to a separate right of feeding and folding an unlimited number of sheep exclusively for his own use, called the *Manor flock*, having and exercising equal rights of pasture with the *Town flock*, upon all the open fields and commons of *Rampton*.

At the trial before *Alderson* B., at the *Cambridge* summer assizes in 1840, the following facts appeared.

In 1839, an act passed for inclosing lands in the parish of *Rampton* (2 & 3 *Vict. c.* 15, Priv. Act), containing the ordinary provisions for allotting land in lieu of the rights of common extinguished, with the usual power to parties dissatisfied with the decision of the commissioner, of trying their right by a feigned issue. Two flocks of sheep had, from time immemorial, been depastured upon the open fields and commons of *Rampton*; the *Town flock*, consisting of sheep put in by the occupiers of certain quantities of ploughed land, the *Manor flock*, consisting of sheep belonging to, and levant and couchant upon, the *Manor Farm*, which, when entire, had contained 500 acres, but which, before the passing of the inclosure act, had been divided into several properties, of which the largest was held by the plaintiff.

Up to the period of this division, the occupiers of the *Manor Farm* had exercised the right of common over the whole of the open fields and commons of *Rampton*, and after such division, the plaintiff exercised the right for his flock, now called the *Manor flock*. This flock and the *Town flock* had common over the same land, and for the same period; but each flock was under the care of a separate shepherd, who changed their walks every day. Upon this evidence it was objected, on the part of the defendant, that the issue must be found for him, the right claimed being general, and the proof

extending only to sheep levant and couchant. The learned judge being of this opinion, directed the jury to find their verdict for the defendant, giving the plaintiff leave to move to enter a verdict for him in case the court should be of opinion that the evidence supported the affirmative of the issue, or that the learned judge ought to have directed a verdict for the plaintiff under the provisions of the rules of *H. T.* 4 *W.* 4.

In the following *Michaelmas* term, *Kelly* moved to enter a verdict for the plaintiff according to the leave reserved, or that the issue might be referred back to the master to be amended, and a new trial had upon such amended issue. The second alternative presented by the application, was founded upon an affidavit, which stated that the feigned issue, as proposed on the part of the plaintiff, contained a count restricting the claim to a right of common in respect of the cattle levant and couchant on the *Manor Farm*; that the defendant objected to the issue so prepared, on the ground that the claim made by the plaintiff before the commissioners had been as follows:—"I claim for and in the right of the whole of the above freehold estate, and of all the freehold lands which formerly belonged to the *Manor Farm*, a separate right of feeding and folding *an unlimited number of sheep* exclusively to my own use, called the *Manor flock*, having and exercising equal rights of pasturage in every respect with the town flock, upon all the open fields and commons of *Rampton*;" that the settling of the issue was referred to the master as directed by the court; and that the master, notwithstanding the remonstrance of the plaintiff by his counsel, decided upon settling the issue in the terms of the claim so made before the commissioner.

To shew that levancy and couchancy would be implied, *Kelly* referred to 1 *Wms. Saund.* 28 n. (4).

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Stephen Serjt. now shewed cause, upon an affidavit which stated that the commissioner had allowed the plaintiff the benefit of a right of common for sheep levant and couchant upon his portion of the *Manor Farm*.

The issue being framed strictly in accordance with the claim which the plaintiff put in before the commissioner, it is submitted that the court has no power to direct the amendment to be made, and that, if they have such power, it ought not to be exercised, for it appears that the plaintiff has already had the full benefit of so much of his claim as he proved at the trial.

There is no ground for entering a verdict for the plaintiff. The claim set up was untenable; it was so considered by the learned judge at the trial. A right of common must be either for a certain number or for cattle levant and couchant. [*Tindal* C. J. That cannot be disputed. *Bompas* Serjt. It is not contended that the plaintiff's case was proved in the very terms of the issue. *Maule* J. Then there cannot be a verdict for the plaintiff upon the issue as now framed.] There is nothing in the act to vary the general rule. The present proceeding is in the nature of an appeal from the decision of the commissioner. No power is given of finding the facts specially. The statute directs "that the costs attending such action, shall abide the event of the trial of such issue or issues." This shews that a direct decision in favour of one of the parties was contemplated. The plaintiff would be entitled to costs if the verdict had been entered for him. That objection cannot be met by saying that the plaintiff renounces all claims to costs. By the fourteenth section, claims are not to be received after the last meeting, except for some special cause to be allowed by the commissioner. If there were any hardship in the case the proper course for the plaintiff to take would be to apply to the commissioner under this exception, and not

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to request the court to assume a jurisdiction which the statute does not confer upon them. A right of common in respect of sheep levant and couchant has, in substance, been made the subject of compensation by the commissioner. The new rules do not apply to the case before the court. The fifth of these rules, upon which the plaintiff relies, is expressly confined to *pleas* of right of common in actions of *trespass quare clausum fregit;* the object of that rule and of the sixth, being, to give to defendants, in actions of *trespass quare clausum fregit*, the same benefit which they might have obtained under the statute of *Anne*, by putting distinct pleas upon the record. But even in those actions to which these rules apply, they do not authorise the entering up of a verdict for a *qualified* right not set up by the plea. *Higham* v. *Rabett.* (*a*) The statute under the provisions of which this parish is enclosed, directs that the issue shall be settled "by the proper officer" not by the court. [*Maule* J. The court appoint the officer; why therefore may not they do the act themselves?]

Supposing the power to exist, no foundation has been laid for exercising it. The plaintiff should have produced an affidavit that he made his claim before the commissioners in respect to the right which he now seeks to place on the record. In *Cobham* v. *White* (*b*) it was held, upon a writ of error from an inferior court, that a prescription for common, for all commonable cattle, not described as levant and couchant, must be understood to mean common without number, and that such prescription is therefore void.

Channell Serjt., on the same side. The leave to move to enter a verdict for the plaintiff was reserved only in

(*a*) 5 *New Cases*, 622., 7 *Scott*, 827.

(*b*) 1 *Roll. Abr.* 398., tit. *Common*, (I.) pl. 8, translated 4 *Vin. Abr.* 586.

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respect of the alleged propriety of having the verdict entered *distributivè*; *Jervis's New Rules*, 134. (*a*) This is a proceeding of a particular character, and is not within the rules of *H.* 3 *W.* 4. If the case fell within the sixth rule, it would also be governed by the fifth, the operation of which is restricted to cases where the plea sets up a right of common in respect of a greater variety of distinct kinds of commonable cattle than the evidence warrants. The power given by the sixth rule is, to construe distributively the multifarious claims mentioned in the fifth. Here, the object of the application is, not to distribute, but to change. (*b*) The right of a claimant is, to have the issue settled in conformity with the claim made before the commissioner. In *Barker* v. *The Tithe Commissioners* (*c*) the court denied that they had any authority to direct an issue to try a claim not made before the tithe commissioners. Here, the foundation is wanting, no such claim having been made. It is submitted that the proper course will be, to discharge the rule, with a recommendation to the commissioners, if the court think such a recommendation called for, to entertain a new claim.

Bompas Serjt. (with whom was *Byles*), in support of the rule. Three claims were made by the plaintiff before the commissioner, one for compensation for his right of common in respect of his freehold land, and one in respect of his copyhold land. The third, which is the one in question, is in respect of a right of a very

(*a*) Citing *Phythian* v. *White*, *Tyrwh. & Gra.* 515., 1 *M. & W.* 216.

(*b*) Under the statute of *Anne* a defendant might have set up a claim for common for sheep and oxen in one plea, for sheep only in a second, and for oxen only in a third. He might also have set up a claim to an absolute right and a qualified right. In the former case, the rules of *H.* 4 *W.* 4. would relieve him against the inconvenience of being restricted to one plea, in the latter, they would not.

(*c*) 9 *M. & W.* 129.

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peculiar nature. [*Tindal* C. J. The difficulty arises from your having claimed in respect of a right different from that which you really possess.] The commissioner under this inclosure act has an equitable jurisdiction, and is not, like a tithe commissioner, bound by the precise form of the claim. He is to decide, not upon, but concerning, the claim. It cannot be denied that the plaintiff ought to have come to this court as soon as the master had settled the issue; and therefore he ought to pay the costs occasioned by his not applying to the court in the first instance. Where the issue joined necessarily requires proof of facts defectively or imperfectly stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would give, the verdict which is found, such defect, imperfection, or omission is cured by the verdict by the common law; 1 *Wms. Saund.* 228. *n.* (1.) (*a*); and accordingly it has been held that the absence of an averment of levancy and couchancy is cured by verdict; *Cheadle* v. *Miller.* (*b*) [*Tindal* C. J. That was "*utendo communiâ.*"] In *Ricketts* v. *Salwey* (*c*) it was held that an allegation that the plaintiff was possessed of a messuage and land, and by reason thereof ought to have common of pasture, was divisible, and that the possession of land only, in respect of which he was entitled to right of common, was sufficient to support the allegation. The power of the commissioner being equitable, the court to which an appeal is given from his decision is bound to decide upon equitable principles. The judge must have told the *jury* that they could not find their verdict for the plaintiff for cattle without number, unless such cattle

(*a*) And see the cases upon this point collected and examined in *Fisher* v. *Clement*, 1 *Mann. & R.* 285.

(*b*) 1 *Lev.* 196. There the omission was, not in the statement of the prescription, but as to the levancy and couchancy of *the cattle distrained.*

(*c*) 2 *B. & Ald.* 360.

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were also levant and couchant. The expression "common *sauns nombre*" is open to two constructions. Upon demurrer, that construction would be taken which was least favourable to the party so stating his right; but upon issue joined, the court will understand the claim in that sense in which it will support the pleading in which it occurs. (*a*) [*Maule* J. That puts an end to the applicability of the case of *Ricketts* v. *Salwey*.] The plaintiff is entitled to a new trial upon another ground. The term unlimited may merely mean undefined. The plaintiff was entitled to common in respect of the manor flock, limited by the enjoyment of common by the town flock. It is true that common cannot be claimed without any limitation; but it may be measured by any thing. It is sufficient if I have common measured by that enjoyed by the town flock. If I sell off a part of my land, I cannot retain the whole of the common if it be for cattle levant and couchant; but if I have common for a certain number of cattle I may. [*Erskine* J. The new trial was moved for on the ground of misdirection.] The plaintiff does not complain of misdirection; his application is addressed merely to the discretion of the court. [*Maule* J. That which is stated upon this record is nothing like a right of common.] The plaintiff has no remedy by mandamus, inasmuch as it is left to the discretion of the commissioner whether he will hear or not.

TINDAL C. J. The plaintiff applies either that a verdict may be entered for him, pursuant to the leave reserved at the trial, or that the issue may go back to the master to be amended in order that the cause may go down to a new trial on such amended issue. It appears to me, that we can grant neither of these alternatives. This action is brought upon a claim disallowed by the

(*a*) *Vide antè.*

commissioner. The first question is, whether the jury having negatived the claim set up upon this record, we can direct a verdict to be entered for the plaintiff for something short of that claim. When the jury have found a verdict negativing a claim upon which a specific issue is taken, it appears to me that we have no authority so to deal with the claim. The claim made before the commissioner, — besides two other claims which were allowed by him, — was in the form stated in the issue as settled by the master.

The first ground taken in support of this application is, that levancy and couchancy being necessarily implied in the claim for common without number, we may insert that term in the issue. I am not aware that any authority has been cited for that position. The cases cited, are cases in which the matters alleged were, in their nature, severable. Here, the insertion of levancy and couchancy could not be made without altering the whole frame of the issue. This is a claim, not of a right of common, but of something in the nature of a separate right of feeding and folding (*a*), which may have arisen out of an exception made by the lord upon granting the lands, or may have been created by act of parliament.

The second ground is, that where a party has proved less than he has claimed, the finding of the jury may be restricted to so much of the claim as he has proved; as where common was claimed in respect of a messuage and land, and was proved in respect of the land only. But there the allegation that the common was appurtenant to the messuage and the land, was a matter of inducement only. Then it is said, that under the rules of *H.* 4 *W.* 4. we may direct a verdict to be entered for the plaintiff to the extent of the right proved.

(*a*) *Vide P.* 1 *H.* 7, fo. 24, pl. 17.; *Keilwey*, 198 *a.*; *Punsany* and *Leader's* case, 1 *Leon.* 11.; *Cowell, in verbis Faldage Faldate, Faldfey.*

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This suggestion is answered by the case of *Higham* v. *Rabett*, which has been cited. Here, the right claimed is quite different from the right proved.

Next it is urged, that the case may be sent back to the master, in order that a new trial may be had upon an amended issue. I am not prepared to say that the mere lapse of time would have prevented our interfering, if we had seen a necessity for so doing.

Here, no application was made to the court to set aside the decision of the master as to the form of the issue. To justify the interference of the court it must clearly appear that the plaintiff has sustained an injury, and that he has no other remedy. Both must be shewn. But the commissioner seems to have taken into his consideration the claim which the plaintiff is now endeavouring to set up.

ERSKINE J. I am also of opinion that the verdict ought not to be disturbed. It is impossible to read the claim laid before the commissioner as a claim in respect of common for cattle levant and couchant. My brother *Bompas* has shewn that such a right as that set up on this record might be established upon proper evidence. But as the jury have negatived the existence of such a right, we cannot direct a verdict to be entered for the plaintiff contrary to that finding. Then it is said that the plaintiff is placed in great difficulty in consequence of the form of the issue; and that the issue ought to be amended. In the first place it does not appear to me, that the real question between the parties has not been tried. No such claim as that now set up was raised before the commissioner. If it had, it is possible that it would not have been opposed. If it had appeared that the plaintiff would be precluded by this verdict from setting up a claim, the court might have interfered, taking care to protect the defendant against costs. But

it appears to me that the commissioner has taken the plaintiff's claim into consideration. If he has not done so, the plaintiff may go before the commissioner, who never having adjudicated upon the claim may do so now.

MAULE J. I am of the same opinion. The rule has two objects, to enter a verdict for the plaintiff upon the present issue according to the leave reserved, or at least upon so much of his claim as was proved. I think it clear that the fourth and subsequent rule of *H.* 4. *W.* 4. do not apply. These rules apply to pleas in bar, and not to other pleadings. They do not, in sense or spirit, extend to such a case as this. From the manner in which their proceedings have been conducted, it is obvious that the plaintiff is chargeable with no such oversight as his counsel has suggested. The master refused to allow the issue to be framed upon a claim which had not been raised before the commissioner. The object of the plaintiff in requiring the insertion of such a claim in the issue to be tried, was probably to secure to himself, wholly or in part, the costs of the trial.

With respect to the sending back the issue to the master to be altered, that is what perhaps might be done if the justice of the case appeared to call for it. But the plaintiff has totally failed in shewing that justice has not been done. The commissioner has awarded compensation to the plaintiff in respect of his rights of common attached to the farm, called the *Manor Farm.* He has also awarded compensation in respect of his freehold and copyhold common rights. This appears to me to form the right now attempted to be set up. The plaintiff might very easily have shewn that it does not, if the fact were so. If we were to make the latter part of the rule absolute, I think we should be re-

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opening that which had already been decided by a competent tribunal.

Rule discharged. (*a*)

(*a*) A bill being afterwards filed to restrain the commissioner from making his award, issues were directed by *Shadwell* V. C. to try whether, at the time of the passing of the act, the plaintiff was in the exercise of the right of sheep-walk, and, if so, for how long time he had been in the exercise of such right. These issues were not tried, the matter being terminated by a compromise.

Jan. 12.

PETRIE *v.* LAMONT and Another.

Case for maliciously and without reasonable or probable cause, obtaining a judge's order to hold the plaintiff to bail, — and without any reasonable or probable cause for believing and not believing that the plaintiff was about to quit *England*, suing out a *capias*, and wrongfully and maliciously *causing the plaintiff to be arrested under and by virtue of the said writ, and to be thereupon imprisoned, &c.* Held, upon the issue of not guilty, that it was sufficient to shew that the plaintiff had been arrested under the writ, without producing the warrant.

CASE. The declaration stated that, on the 30th of *January* 1841, the defendants and one *Matravers* had brought an action on promises against the plaintiff in the court of Exchequer, which then was pending and undetermined; and thereupon the defendants, on the day and year aforesaid, not having any reasonable or probable cause for believing, and not believing, that the plaintiff was then about to quit *England* unless he should be forthwith apprehended, but wrongfully and unjustly contriving and intending to imprison, harass, oppress, and injure the plaintiff maliciously, and without any reasonable or probable cause, represented and pretended to the Hon. Sir *John Gurney*, Knight, then being a judge of one of Her Majesty's superior courts of common law at *Westminster*, to wit, of the Court of Exchequer; and that there was then probable cause for believing that the plaintiff was about to quit *England* unless he should be forthwith apprehended; and then falsely and maliciously, and without any reasonable or

probable cause, caused and procured the said Sir *J. Gurney*, so being, &c., to make a special order, whereby the said Sir *J. Gurney* ordered that the plaintiff should be held to bail in the said action, for 275*l.*; as by the said order, now remaining among the proceedings of the same court, will more fully appear. And the defendants contriving and intending as aforesaid, afterwards on the day and year aforesaid, falsely and maliciously, and without having reasonable or probable cause for believing, and not believing, that the plaintiff was then about to quit *England* unless he should be forthwith apprehended, within the time in the said order expressed, sued out of the last mentioned court for themselves and *Matravers*, a certain writ of our Lady the Queen, called a writ of *capias*, directed to the sheriff of *Middlesex*, by which writ the said Lady the Queen commanded the said sheriff, that he should take the plaintiff if he should be found in his bailiwick, and him should safely keep until he should have given the said sheriff bail, or made deposit with him according to law, in an action on promises at the suit of the defendants and *Matravers*, or until the plaintiff should, by other lawful means, be discharged from the said sheriff's custody. And the defendants contriving and intending as aforesaid, afterwards, to wit, on, &c., not having any reasonable or probable cause for believing, and not believing, that the plaintiff was then about to quit *England* unless he should be forthwith apprehended, wrongfully and maliciously caused the said writ to be, and the same then was, marked and indorsed for bail for 275*l.* And the said writ being so marked and indorsed for bail as aforesaid, the defendants afterwards, and before the return thereof, to wit, on, &c., contriving and intending as aforesaid, without having any reasonable or probable cause for believing, and not believing, that the plaintiff was then about to quit *England* unless he should be forthwith apprehended, *wrongfully and maliciously caused*

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the plaintiff to be arrested by his body under and by virtue of the said writ, and to be thereupon imprisoned and kept and detained in prison for the space of ten days then next following, and until the plaintiff, in order to procure his release and discharge from the said imprisonment, was forced and obliged to, and, on the 4th of *February* 1841, did apply to one of the judges of the superior courts at *Westminster*, to wit, the said Sir *J. Gurney* then being, &c. for, and obtain an order on the defendants and *Matravers*, to shew cause why the plaintiff should not be discharged out of custody; and such proceedings were thereupon had, that the said order was afterwards, on the 6th of *February* 1841, by the Right Hon. Sir *J. Parke*, Knight, then being a judge of one of Her Majesty's superior courts of common law at *Westminster*, to wit, of, &c., made absolute; and the said Sir *J. Parke* so being such judge, then ordered that the plaintiff should be discharged out of custody; as by the said order, &c., will more fully appear. And the plaintiff then was discharged out of custody accordingly, and the said imprisonment and arrest of the plaintiff, and the proceedings under and by virtue of the said writ wholly ended and determined. Whereas in truth and in fact, the defendants, at the time of the procuring of the special order first mentioned to be made as aforesaid, and of the suing forth of the said writ of *capias*, and of the said arrest and imprisonment, had not, nor had either of them, any reasonable or probable cause for believing, nor did they, or either of them, believe that the plaintiff was about to quit *England* unless he should be forthwith apprehended. By means of which several premises the plaintiff, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful affairs

and business by him during that time to be performed and transacted, but was also forced and obliged to lay out and expend, and did necessarily lay out and expend divers large sums of money, in the whole amounting to 50*l.*, and did then necessarily incur and become liable to pay divers large expenses, costs, and charges, in the whole amounting to other 50*l.*, in and about the procuring and obtaining of his release from the said imprisonment, and in and about other the premises, and had been and was, by means of the premises, otherwise greatly injured and damnified, &c.

Plea: not guilty.

At the trial before *Tindal* C. J. at the sittings at *Westminster* after last term, the plaintiff put in evidence the order of Mr. Baron *Gurney*, and also a writ of *capias* which had been issued thereon and lodged with the sheriff. The *capias* was not shewn to have been returned, neither was any warrant produced. The sheriff's officer stated that he had given the warrant to a person of the name of *Winslow* who keeps the key of *Sloman's* lock-up-house, and that he had searched for it in *Sloman's* office and house, but could not find it.

It was contended, on behalf of the defendants, that no sufficient search for the warrant had been shewn, so as to let in secondary evidence.

The Lord Chief Justice having reserved the point, the plaintiff, in order to supply the want of the warrant, proved that while the plaintiff was under arrest at *Sloman's* lock-up-house, his attorney called upon the defendants; and on it being stated to them, that the plaintiff was in custody at their suit, one of the defendants declared, in the presence of the other, that "they had got him fast, and if it cost 500*l.* they would punish him." It was further shewn that the attorney who had been employed by the defendants to obtain the judge's order, and to issue the *capias*, attended before Mr.

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Baron *Parke* to oppose the plaintiff's discharge, and that the order for his discharge being served upon *Sloman*, the plaintiff was set at liberty.

The plaintiff having obtained a verdict, damages 15*l*,

Bompas Serjt. now moved, pursuant to the leave reserved, to enter a nonsuit. The question will be, whether there was any evidence of the plaintiff being arrested under the *capias* mentioned in the declaration, the warrant not having been produced. It is clear that no sufficient search for the warrant was proved, so as to let in secondary evidence of its contents. [*Tindal* C. J. The question is, whether it was necessary to produce the warrant.] It was essentially necessary in order to support the declaration, that it should be shewn that the plaintiff was arrested under the writ therein mentioned; and it is submitted that the conversation spoken to by the plaintiff's attorney, did not tend to prove that the arrest took place under that writ. The defendants might have had the plaintiff "fast" by a variety of means; and the absence of a written instrument is not be supplied by inferences drawn from other facts; for if so, documentary evidence might be dispensed with in almost every case.

TINDAL C. J. The question is, whether there was any evidence to go to the jury to satisfy the averments in the declaration that the defendants, maliciously and without reasonable or probable cause, procured a judge's order to hold the plaintiff to bail; and afterwards, maliciously and without having reasonable or probable cause for believing, and not believing, that the plaintiff was about to quit *England*, sued out a *capias*, and "wrongfully and maliciously caused the plaintiff to be arrested by his body under and by virtue of the said writ, and to be thereupon imprisoned." The declar-

ation contains no allegation that the plaintiff was arrested under a warrant. The point is, whether there was not an admission by the defendants that the plaintiff had been arrested under the writ at their suit; and it seems to me, from the course the cause took at the trial, that there was sufficient evidence of that fact. The judge's order and the writ were proved; and it was not pretended that any other order or writ had been obtained by the defendants against the plaintiff. On the plaintiff's being taken into custody, the defendants say: "We have got him fast &c."; and I cannot see to what that observation could possibly apply except to the arrest under this writ. But besides that, the defendants' attorney, the very person by whom the writ was sued out, appears before Mr. Baron *Parke* to oppose the plaintiff's discharge. The order for his discharge is served upon the same officer in whose custody he was under the writ, and the plaintiff is thereupon let out of custody. I think therefore that, independently of the warrant, there was sufficient evidence to justify the jury in coming to the conclusion they did.

COLTMAN J. I am of the same opinion. If it had been necessary to shew that a warrant had been regularly issued, I should have agreed with my brother *Bompas* that the proper steps had not been taken to entitle the plaintiff to give the contents of the warrant in evidence. But it does not seem to me to have been requisite that any warrant should be produced. All that was necessary was, to connect the defendants with the arrest under this writ; and whether the officer had a warrant, or chose to act irregularly, and to arrest the plaintiff without one, was not material; for there was sufficient evidence in the case to connect the defendants with the writ. The proceedings before the judge at chambers can only be

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referred to the writ issued by the defendants. It seems to me that there is no ground for the present motion.

ERSKINE J. The plaintiff was in custody; and by the admission of the defendants he was in custody at their suit. The question is, whether there was evidence to go to the jury that he was arrested under the writ stated in the declaration. It appears that there was an order to issue a *capias*, that a *capias* was issued, and that afterwards the plaintiff was in custody. To what can his arrest be referred except to that writ?

MAULE J. I also think that it was not necessary to prove the existence of any warrant. What it was requisite to prove was, that the defendants arrested the plaintiff *under the writ mentioned in the declaration*. One way in which this might have been proved would have been by the production of a warrant. The evidence given was better proof than a warrant would have afforded. On the hearing of the summons the defendants admitted that the plaintiff had been arrested at their request under the writ, and they opposed his discharge. If he was arrested at their request, the averment in the declaration is supported, whether the arrest was under a warrant or not.

Rule refused.

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A. having, in 1835, granted to *B.* an annuity of 150*l.* for twenty-one years, with certain allowances to *B.* on the sale by him of spirits made by *A.*, by a deed containing a proviso that when the allowances should exceed 400*l.* a year, the annuity should not be payable so long as those allowances exceeded 400*l.* a year,—by a memorandum in writing, in 1836, without deed, it was agreed that in consideration of *B.*'s *relinquishing* the annuity, *A.* should pay to *B.* 300*l.* a year, from a certain day, for seven years, in lieu thereof. In a letter addressed by *A.* to *B.*, in 1838, and assented to by *B.*, *A.* declared that *B.* was entitled under the deed to certain specified allowances, not to be less than 400*l.* a year, or to be made up to that amount, and that *B.* was to receive 300*l.* a year over and above all other allowances under the agreement of 1836, so as to yield him together not less than 700*l.* a year.

Held, that *B.* was entitled under the agreement of 1836, taken by itself, to the 300*l.* a year, irrespectively of the amount of allowances receivable by him.

Held also, that a plea of want of consideration for the agreement contained in the letter of 1838, was bad, inasmuch as after that letter had been written by *A.* and assented to by *B.*, the subsisting engagement between the parties consisted of that letter and the previous agreement taken together.

Held also, that no release of the annuity by deed was necessary; and that abstaining from demanding or receiving the annuity was a sufficient *relinquishment*.

ASSUMPSIT. The first count stated—that before and at the time of the making of the articles of agreement, and of the making of the defendants' promise, thereinafter respectively mentioned, certain persons trading under the style and firm of *Betts* and Co., sold a certain liquor, to wit, *British* brandy, at *Smithfield Bars* in *London*, whereof the defendants then had notice; that afterwards and before the making of the said promise, to wit on the 27th of *July* 1835, by certain articles of agreement bearing date &c., made between the plaintiff of the first part, the defendant *Grimble* of the second part, and the defendant *Booth* of the third part, the plaintiff, in consideration of the emoluments to arise as thereinafter mentioned, covenanted with the defendants respectively to communicate to them, their executors and administrators, and to communicate to them only, and to use all the knowledge he possessed connected with a certain process for the rectification and

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effectual purification of grain-spirit, and communicating to it the flavour of *Cognac* brandy, without the admixture of any imported brandy, and without any infraction or evasion of the then existing excise laws, the plaintiff, in consideration of certain emoluments, agreed with the defendants respectively, to communicate to them only, all the knowledge he possessed, connected with that matter, and to develope to them the whole process for conducting the same, and to convey to them all necessary information as to materials, &c., so that they might be able to prosecute the same independently of the plaintiff. And by the said articles it was agreed that the plaintiff should, within twenty-one days of the date *thereof*, make out and deliver to the defendants, or one of them, a written statement of the whole of the inventions and discoveries connected with his improved process for the rectification of spirit and preparing of brandy, and the art of giving the same the true colouring in imitation of the most approved *Cognac* brandy, setting forth also his theoretical and practical views applicable to the rectification of spirit, &c. &c. And by the said articles the plaintiff declared that he had not divulged, and would not divulge, any of those processes to any other person or persons whatsoever during the existence of that contract, and that he would answer all inquiries from the defendant *Booth* or the defendant *Grimble* touching those matters, and render his best aid and assistance at all reasonable hours in forwarding the progress of that undertaking, and that he would give his personal attention and superintendence to the rectification and the flavouring and colouring of the spirit, &c. &c., and act and do in all things in respect of that matter to the best of his power and ability, and as a faithful party to the interests of the defendants, and should and would be true and faithful to the defendants in all things, and keep true and just and complete

accounts of all dealings, orders, and transactions made and entered into, by the plaintiff for and on behalf of the defendants in, or connected with, the said undertaking, and make out and deliver to the defendant *Grimble* or the defendant *Booth* all or any of such accounts whenever thereunto required by the defendant *Grimble* or the defendant *Booth*, or their respective executors or administrators, he, the plaintiff, having all necessary assistance for those purposes; and further that he, the plaintiff, should not at any time during that contract, instruct any other person or persons in those matter, nor engage in any other business or employment whatsoever, or enter into any liabilities as a partners or surety, and should not hold himself out as a partner with the defendants, or either of them, in that undertaking, &c. And it was in the said articles stipulated that the plaintiff should give his attendance to direct and as superintending only, and as might be necessary to forward the usual proceedings of the manufacturing establishment; and that his presence and attention were to be given for that purpose only, and no further, notwithstanding any thing previously contained; and that if any other superintendent should be appointed to interfere in those proceedings, the plaintiff should no longer be required to give his personal attendance. And the plaintiff thereby further engaged that the articles produced by him on his being supplied with such suitable spirit and materials as might be specified in the statement to be made out by the plaintiff, should be fully equal, if not superior, to the patent *French* distilled brandy (meaning thereby the said *Betts* and Co.'s, of *Smithfield Bars*, *British* brandy then selling in *London*). And in consideration of the premises the defendants did, for themselves and each of them, their and each of their heirs, executors, and administrators, jointly and severally, undertake that the defendant *Grimble*

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should, within twelve months from the date thereof, carry into operation the said discovery or improved process, agreeably to the directions contained in the written statement to be given in by the plaintiff, and provide a suitable capital and plant, and all proper utensils and apparatus to carry on the same; and that the defendant *Grimble*, his executors and administrators, should pay unto the plaintiff annually, for a term of twenty-one years, determinable as thereinafter mentioned, to commence from the 19th of *July* then instant, the sum of 150*l.*, and the further payment of 6*d.* per gallon on all spirit sold, sent out, or used, rectified by the said process, and on all brandy sold and sent out, but not drunk on the premises, or *bonâ fide* given away as samples. And by the said articles of agreement, after further reciting that the plaintiff had bestowed much time and research in regard to the flavouring and colouring of brandies, it was agreed, as an indemnity and encouragement to him in his researches, and to enable him to promote that matter, that should he succeed in effecting the flavour for a less sum than 8*d.* per gallon, at the then present usual and legal sending out strength of brandy, then the plaintiff should be entitled to a further sum, in addition to the other allowance above named, equal to one half of the said saving, to be fixed after a fair average had been taken, the said average to be taken every six months, and to be paid to him in respect of every gallon of brandy so flavoured, along with the other allowances. And it was thereby agreed that the plaintiff should be empowered to select and purchase the articles used in that new process of rectification, or used for flavouring and colouring the produce, rendering at all times just and true accounts and the original invoices and memoranda of all purchases made by him,—and which should not exceed the sum of 100*l.* for materials on hand,—which the defendants

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thereby agreed to provide for payment of. And to prevent all dispute between the parties, it was thereby agreed that at the same time that the plaintiff delivered his written process to the defendant *Grimble* or the defendant *Booth*, as aforesaid, a written statement should be given in by them, or one of them, to the plaintiff of the exact process then used and employed by them, stating and setting forth, &c.; and if no such written statement should be at that time given in, or if such process should be different from that communicated, by the plaintiff, that it should be considered that his process was a new and distinct process, and should be taken as such accordingly, and that no improvement or alteration or modification of the plaintiff's process thereafter should annul or alter the said engagements in the said articles of agreement contained. And it was thereby agreed that when the amount of allowances to the plaintiff should exceed 400*l.* annually, then the before mentioned annuity of 150*l.* should not be payable unto him, nor should it be demanded by him, so long as such receipts should amount to 400*l.* per annum; the account of spirits sold, sent out, or used, to be taken quarterly, at which periods the plaintiff was to be paid his amount on the quantities so sold, sent out, or used, as well as the amount due to him in respect of brandies sold, sent out, or used, on account of the flavouring, should such be due; and that a daily account of all spirits manufactured &c. should be kept by the defendants in a book, to which the plaintiff should have access at all times for the purposes of examination and making extracts; and, that at the expiration of the then agreement, 6*d.* per gallon, on &c. should be payable to the plaintiff. And it was thereby further agreed that it should not be lawful for the defendant *Grimble* or the defendant *Booth*, to use or apply, or in any manner to aid in carrying on, the said processes, or any part thereof, except such as

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were then already used or carried on by the defendant *Grimble* or the defendant *Booth*, as set forth by their statement, in any other establishment, during the existence of that contract, than such premises as were then taken for those purposes, and situated, &c., without the plaintiff's consent and participation. And it was thereby agreed, that if, at the expiration of the first seven or fourteen years of the said term of twenty-one years, the defendants should desire to relinquish and abandon the said processes and that undertaking entirely, then it should be lawful for them so to do on giving to the plaintiff six calendar months' previous notice in writing, and thereupon that agreement should be at an end, except as to the enforcement, up to that time, of the stipulations therein contained. And it was thereby covenanted between the parties thereto, that the receipts falling due to the plaintiff annually, should, after the lapse of two years from the date of the said articles of agreement, amount to 400*l.* annually; and that should they fall short in any one year, and not be made up to that amount, the plaintiff should not be obliged to confine his attention or his secrets to the defendant *Grimble* or the defendant *Booth*. And the said parties thereby agreed that a penalty of 10,000*l.* should be recoverable in any court of law, as liquidated damages, if either party should, during the continuance of the said term, divulge to any other person or persons whatsoever any of the processes, secrets, or knowledge touching the said matters, whereby the purification &c. should or might be imitated; or if the defendants, or either of them, should, after the determinaton of the said term, by notice as thereinafter mentioned, divulge such process, secrets, or knowledge to any other person or persons whatsoever, or make, rectify, or otherwise use the same processes for any purpose whatsoever; it being intended that the plaintiff should, after the

determination of the said term by notice as aforesaid, retain all the benefits of his processes, &c., for his own benefit; and that should the plaintiff die before the expiration of that agreement, then his executors, administrators, or assigns, should be entitled to one half of the emoluments which would have been enjoyed by the plaintiff had he lived during the remainder of the said term, with the exception of the said annual payment of 150*l.*, receiving the amount quarterly in the same manner. And further, that after payment of all such outgoings, allowances, and expenses, the entire profits of the said undertaking should belong to the defendants, or either of them, as they might mutually agree upon; as by the said articles of agreement, sealed with the respective seals of the plaintiff and the defendants, would more fully appear.

That afterwards and before the commencement of the suit, to wit, on the 23d of *August* 1836, by an agreement then made between one *Johann Gottfried Stumpf*, the defendants, and the plaintiff,—under which the plaintiff was to have the benefit of *Stumpf*'s services, and of certain secrets possessed by him, in the prosecution of the process or manufacture,—it was agreed that *Stumpf* should deposit with the plaintiff a written description of the *modus operandi*, and a recipe of the ingredients to be used; that *Stumpf* should, with the consent of the plaintiff, be engaged by the defendants for a term of seven years from the 1st of *August* 1836—the agreement to be absolute, and binding on all parties, for a further term of seven years, provided the house, after the expiration of the first seven years, should, with the consent of the plaintiff previously obtained in writing, continue to use the flavouring or the processes of *Stumpf*, or should fail to give *Stumpf* six months' previous notice of the intended relinquishment; that should the attendance of *Stumpf* be requested in *England*, the annual

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sum of 300*l.* should be allowed him for the same, or such proportional part as might accord with the period of his required occupation, as well as all reasonable travelling expenses, in addition to his other allowances; that 4*d.* a gallon should be allowed to *Stumpf*,—over and above the price of flavouring, as an indemnity to him for his personal exertions, and the secrets to be communicated by him,—to be taken at the usual legal sending-out strength of brandy, on all spirit sold and sent out, rectified by his process, or flavoured for the purposes of brandy, whether flavoured by his ingredients or other ingredients, and, on final settlement, on all such spirit and brandy in stock unsold; not to yield him less than 500*l.* for every year, during the contract; and that if the same should be deficient from inadequacy of sales during any year, it should be made up to that amount by the defendants, and be paid to *Stumpf* quarterly, as sold, through the hands of such banker in *London* as *Stumpf* might employ to receive the same; that in the case of the death of *Stumpf* before the expiration of the contract, one half of what would otherwise have been the emoluments of *Stumpf*, independently of the price of flavouring, was to be allowed to the widow of *Stumpf*, and, failing her, to such party or parties as might be appointed by *Stumpf* by will; she or they agreeing in like manner, and continuing, to supply the said flavouring to the plaintiff, according to the tenor of that agreement; and that the plaintiff should enjoy all the rights and benefits from all brandies sold and sent out from the said premises, in regard to the processes and materials, and matters to be given in by *Stumpf* in his written statements, as fully as if they had been the discoveries and processes, and matters of the plaintiff, and had been introduced by him in his specification; that in consideration of those covenants, and the plaintiff's *relinquishing* the said annual sum of 150*l.* granted to

him by the defendants, in and by the said articles of agreement covenanted as aforesaid to be paid to the plaintiff, it was thereby agreed, on their part, to pay him 300*l.* a year from the 19th of *July* then last past, payable quarterly during that contract, in lieu thereof, and that no rights or benefits, or privileges belonging to the plaintiff, not there set forth and given up, should be relinquished by that agreement; and the defendants thereby agreed to sell the brandy made at the works at *Albany Street*, at fair usual mercantile prices; and it was thereby agreed that the parties thereto should not divulge those processes or secrets, or the knowledge contained in the statement, or the recipe of *Stumpf;* and that the defendants would not otherwise use or apply the same than at the said works at *Albany Street*, (then followed a clause for referring disputes to arbitration); that as the preceding agreement had been drawn up by the parties themselves, and executed in its then form to avoid delay, it was agreed by the respective parties thereto, that either of them should be at liberty, if he thought fit, within six months from the date thereof, to call upon the other and others of the said parties to enter into, and execute, at their joint expense, a more formal stamped deed under seal, embodying, and reducing into legal form the several engagements contained in that memorandum, and intended to be entered into by the respective parties; and that a penalty of 5000*l.* should apply to any of the parties committing a breach of those engagements; as by the said memorandum would more fully appear.

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That afterwards, and before the commencement of the suit, to wit, on the 25th of *January* 1838, by a certain other memorandum of agreement in writing, then made between the defendants and the plaintiff, it was further agreed as follows; that is to say, "Sir,—To avoid any misunderstanding as to the mean-

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ing and interpretation to be put upon the articles of agreement of the 27th of *July* 1835, and the memorandum of agreement dated the 23d of *August* 1836, now existing between us, in regard to certain payments to be made by us to you, we (meaning the defendants) hereby declare that you (meaning the plaintiff) are entitled, under the deed of 1835, to 4*d.* a gallon on all spirits sold sent out or used, rectified by your processes, and 6*d.* a gallon on all brandies sold and sent out from the premises in *Albany Street*, not to yield you less than 400*l.* for every year, or to be made up to that amount, as well as any saving that may be effected in the flavouring of brandies, as set forth in that deed; and that you (meaning the plaintiff) are to be paid 300*l.* a year over and above all other allowances under the agreement of 1836, to yield you together not less than 700*l.* annually, and such further sum as the sales at 4*d.* and 6*d.* a gallon as above named, may amount to; these allowances to be united and consolidated from the 19th of *July* 1837, and to be paid to you simultaneously every three months after that period during these contracts. And this is the intention and meaning under which these instruments are to be construed and taken, and which understanding we agree shall be made legal, and be added to and form part of the agreement of *August* 23d, 1836." Signed, *F. Booth*, *W. Grimble*, addressed to *D. Home*; as by the last mentioned agreement would more fully appear.

The declaration, after setting out mutual promises in respect of all the premises, alleged a general performance by the plaintiff of his part of the several agreements, and a particular performance of a variety of conditions.

The declaration then stated, that although the plaintiff had always from the time of making the said memorandum of agreement of the 23d of *August* 1836, wholly *relinquished* the said annuity of 150*l.* so granted to

him by the defendants as in the said sealed articles of agreement and in the said memorandum of agreement, is mentioned, according to the tenor and effect, true intent and meaning of the said memorandum of agreement of the 23d of *August* 1836 aforesaid; and although the plaintiff afterwards, and after the first two years and a quarter of the arrears thereinafter mentioned, ending on the 19th of *October* 1840, had become due, and also after the commencement of the quarter of a year, in respect whereof the residue of the arrears thereinafter mentioned became due, to wit, on the 9th of *January* 1841, by his certain deed poll sealed with the seal of the plaintiff, — which deed poll being in the possession of the defendants, the plaintiff could not produce the same to the court here, — did, so far as according to the tenor true intent and meaning of the said memorandum of agreement of the 23d of *August* 1836, it was intended that the said annuity of 150*l.* should be released, — remise, release, *relinquish*, give up, and for ever quitclaim, and discharge unto the defendants, and each of them their and each of their executors and administrators, all and all manner of action and actions, suit and suits, cause and causes of action and suit, debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, both at law and in equity, or otherwise howsoever, which the plaintiff ever had or then had, or which he his executors or administrators could, should, or might at any time thereafter have, claim, set up, challenge, or demand against the defendants or either of them, their or either of their executors or administrators for, upon, or by reason, or on account of the said annuity of 150*l.* accruing due, or which, but for the said agreement of the 23d of *August* 1836, might have accrued due subsequently to the said 19th of *July* 1836, or for, upon, or by reason, or on account of any matter or thing relating to the same annuity subsequently

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to the day and year last aforesaid, and so far as aforesaid; provided always, nevertheless, that those presents or any matter or thing therein contained, were and was not to be construed as extending to release or discharge any other of the payments or allowances to which the plaintiff was, or to which he his executors or administrators, might be entitled, under the terms and provisions of the said articles and memorandum of agreement respectively, or any other agreement subsisting between the defendants and the plaintiff, but that those presents were to be taken and construed only as such an absolute release and extinguishment of the said annuity of 150*l.*, as according to the true intent and meaning of the said agreement of the 23d of *August* 1836, was intended to be given by the plaintiff, and no further or otherwise; as by the said deed poll will more fully appear; and although the defendants did in part performance of their said promise pay the plaintiff the said sum of 300*l.* a year from the said 19th of *July* 1836 aforesaid, for a certain time to wit, until the 19th of *July* 1838 aforesaid; and although the plaintiff from thence until the commencement of the suit had been ready and willing to receive the same sum in lieu of the said annuity of 150*l.*, according to the terms of the said several agreements of the 23d of *August* 1836, and the 25th of *January* 1838; of which several premises the defendants during all the time aforesaid, had notice; and although afterwards and during the continuance of the said contract in the said agreement of the 23d of *August* 1836, mentioned and contained, and before the expiration of the said term of seven years from the 1st of *August* in the year aforesaid, and before the commencement of this suit, to wit, on the 19th of *January* 1841, a certain large sum of money to wit, 750*l.* for two years and a half of the said term then elapsed, became and was due and in arrear to the plaintiff on account of the said yearly sum

of 300*l.*, so payable as in the said agreement of the 23d of *August* 1836 mentioned, yet the defendants to pay the same or any part thereof, had wholly refused and still did refuse; contrary, &c. [Profert of articles.]

Second plea to the first count, — that there never was any consideration for the making, by the defendants, of the supposed agreement in that count *lastly* above-mentioned. Verification.

Special demurrer, assigning for causes, — that the second plea amounted to the general issue; that it was argumentative, and an evasive and indirect denial of the cause and causes of action shewn, by the first count, to be vested in the plaintiff under the two several agreements to which the mutual promises therein laid extended; that the plea did not sufficiently traverse the allegation in the first count — that by the said memorandum made between the defendants and the plaintiff, it was agreed as in the first count was lastly mentioned, — or confess and avoid that allegation; that it appeared on the face of the first count that there was a good consideration for the making, by the defendants, of the said agreement in that count lastly mentioned, to wit, to avoid any misunderstanding as to the meaning and interpretation to be put upon the said sealed articles and the said memorandum of agreement dated the 23d of *August* 1836, in that count respectively mentioned in regard to the payments to be made by the defendants to the plaintiff; and that the plea concluded with a verification, instead of concluding to the country, &c. Joinder in demurrer.

Fourth plea, as to so much of the first count of the declaration as related to the nonpayment of 675*l.* being parcel of the alleged arrears of 750*l.* in that count mentioned, and which first accrued and became due and in arrear, as in that count alleged, to wit, for the first two years and a quarter of the said period of two years

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and a half in the said first count also mentioned, that although true it was, that the plaintiff made and executed the said deed-poll in the first count mentioned under his seal as in the said first count mentioned, yet the plaintiff did not by any deed or instrument in writing signed by the plaintiff, or sealed by him, under his seal relinquish the said annuity of 150*l.* in the said first count mentioned, or any part thereof at any time before the said period of two years and a quarter in the introductory part of this plea mentioned, had fully passed, or before the said sum of 675*l.* parcel &c. as aforesaid in the introductory part of this plea also mentioned, or any part thereof, had become or was due, or in arrear, as in the said first count alleged; concluding to the country.

Special demurrer, assigning for causes — that the plaintiff's not having, by any deed or writing signed by the plaintiff, or sealed by him, under his seal relinquished the said annuity of 150*l.* in the first count mentioned, or any part thereof, as in that count is alleged, at any time before the said period of two years and a quarter in the introductory part of the fourth plea, and in that plea, mentioned, had fully passed, or before the said sum of 675*l.* parcel &c., or any part thereof had become and was due and in arrear, as in the said first count alleged, was no answer to the action; that the relinquishing of the said annuity of 150*l.* by deed, was not a condition precedent to the annuity of 300*l.* agreed for in lieu thereof, becoming payable; and that by virtue of the said deed-poll the said sum of 675*l.* parcel of the said sum of 750*l.* in the introductory part of the fourth plea, and in that plea mentioned was recoverable in this action &c. Joinder in demurrer.

Fifth plea, — as to so much of the first count as related to the nonpayment of 75*l.*, being the last quarter's arrears of the annuity of 300*l.* in that count mentioned to have become due and in arrear, and being the residue

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of the said sum of 750*l.*, — that although the plaintiff made and executed the said deed-poll, as in the said first count mentioned, yet the plaintiff did not, by any deed or instrument in writing signed by the plaintiff, or sealed by him, under his seal relinquish the said annuity of 150*l.* in that count mentioned, or any part thereof at any time before the commencement of the said last quarter in and for which the last-mentioned sum of 75*l.* was so alleged to have become and to be due and in arrear, as aforesaid; concluding to the country.

Special demurrer, assigning for causes—that the plaintiff's not having, by any deed or instrument in writing signed by the plaintiff or sealed by him, under his seal relinquished the said annuity of 150*l.* in the first count mentioned, or any part thereof as in that count alleged, at any time before the commencement of the said last quarter, in and for which the last-mentioned sum of 75*l.* was so alleged to have become and to be due and in arrear, as aforesaid, was no answer to the action, — that the relinquishing of the said annuity of 150*l.* by deed was not a condition precedent to the right of the plaintiff to receive the annuity of 300*l.* agreed to be paid in lieu thereof — and that by virtue of the deed-poll, made and executed as in that count alleged, the last-mentioned sum of 75*l.* became and was due and in arrear, and was recoverable in this action, &c. Joinder in demurrer.

Sixth plea — as to the first count, except so much thereof as related to the nonpayment of 150*l.* parcel of the said alleged arrears of 750*l.*, and being two quarterly payments of the yearly sum of 300*l.* in that count mentioned, which became due and in arrear for the last half year of the period of two years and a half therein mentioned, — that after the making of the promise of the defendants in the first count mentioned, and during the said term of seven years from the 1st of

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August 1836, and also during the said first seven years of the said term of twenty-one years, and before and during the whole of the period, for and during which the said yearly sum of 300*l.* was by the first count alleged to be in arrear, except as to the said sum of 150*l.* parcel &c., and before the commencement of this suit, divers, to wit, 500,000 gallons of brandy were prepared and made by the defendants, at the said works and premises in *Albany Street*, in the preparation and making whereof the discoveries, processes, and matters of the plaintiff and *Stumpf*, in the first count mentioned and referred to, had been and were used and employed, and divers, to wit, 20,000 gallons of such last-mentioned brandy had been and were sold and sent out from the works and premises last aforesaid, by the defendants during each quarter of a year, and period of three months, for and during which the said yearly sum of 300*l.* was alleged to be in arrear and unpaid as aforesaid, save and except the said arrear of 150*l.* parcel &c.; that upon such brandy so sold and sent out as last aforesaid, — the quantities whereof were duly taken and calculated, at the respective times of sending out the same quarterly, according to the said agreements in the first count mentioned, — the plaintiff became and was entitled, according to the true intent and meaning of the same agreements, to the said allowance of 6*d.* a gallon, on each of the gallons so sold and sent out by the defendants as aforesaid; that such allowance, to which the plaintiff was entitled, and which was payable to him as last aforesaid, in, for and during each quarter of a year, and period of three months, for and during which the said yearly sum of 300*l.* was so alleged to be in arrear as aforesaid, save and except the said arrear of 150*l.* parcel &c., amounted to, and yielded to the plaintiff, a large sum of money, to wit, 500*l.*, — which exceeded the sum of 100*l.*, being a

quarter part of the sum of 400*l.* in the said first count mentioned and referred to, — and that, in and for, and during each year for and during which the said yearly sum of 300*l.* was alleged to have been unpaid as aforesaid, except the said last half-year thereof, in which the said sum of 150*l.* became in arrear as aforesaid, such last-mentioned allowances of the plaintiff amounted to and yielded to him a sum exceeding the sum of 400*l.* in each of the same years, to wit, the sum of 1000*l.* — of all which premises respectively, the plaintiff at the respective times of the said alleged arrears of the said yearly sum of 300*l.* in the count alleged to be unpaid, except the said arrear of 150*l.* parcel &c. as aforesaid, respectively becoming due, and before the commencement of this suit, had notice; that by reason of the premises and of the plaintiff's having relinquished the annuity of 150*l.* a year, as in the first count alleged, and having been ready and willing to receive the said yearly sum of 300*l.* in lieu thereof, as therein also alleged, such last-mentioned annuity, during all the period for which the same yearly sum was claimed to be in arrear as aforesaid, except the said last half-year thereof, wholly ceased to be payable to the plaintiff: that the plaintiff so being entitled to the said allowances as aforesaid, the defendants did before the commencement of the suit, to wit, on the 19th of *October* 1838, and on divers other days and times &c., and in, and for each of the said years, for and during which the said alleged arrears, except the said arrear of 150*l.* parcel &c., became due as aforesaid, pay to the plaintiff who then accepted and received from the defendants for and on account of the allowances to which he was entitled as aforesaid, and according to the true intent and meaning of the said agreements, divers moneys, amounting, in the whole, in and for each year of the last-mentioned years, to a sum of money exceeding the sum of 400*l.* annually,

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and in and for each of the same years, to wit, the sum of 1000*l.* Verification and prayer of judgment.

Special demurrer, assigning for causes — that it appeared from the agreements dated respectively the 23d of *August* 1836, and the 25th of *January* 1838, that the intention of the parties respectively in making those agreements was not, as in the sixth plea supposed, that the annuity of 300*l.* agreed to be paid by the defendants to the plaintiff for the period of seven years extendible at the option of the defendants to the further period of fourteen years, according to the said two last agreements, *in lieu* of the said annuity of 150*l.* a year, covenanted to be paid by the articles of agreement in the first count also mentioned, during the said term of twenty-one years therein mentioned, determinable by the defendants as therein alleged at the expiration of the first seven or fourteen years thereof was, like that annuity of 150*l.* a year, to cease and not be payable to the plaintiff, nor to be demanded by him so long as the receipts of allowances by the plaintiff should amount to 400*l.* per annum, but on the contrary thereof such intention was and is, that the said annuity of 300*l.* a year was and is to be irrespective of, and over and above, all allowances whatsoever mentioned and stipulated for, in, and by the said several agreements, &c. Joinder in demurrer.

The seventh plea, which was pleaded to the 150*l.* excepted in the sixth plea, differed from the sixth plea in setting up a payment after action, instead of payment before action.

Special demurrer, assigning for causes — that the plea was pleaded in bar of the maintenance of the action, generally, as to the causes of action in the introductory part thereof mentioned, yet it disclosed only grounds for contending that the *further* maintenance thereof ought to be barred; that the plea in the body and

substance thereof, fell short of that to which by its introduction, commencement, and conclusion respectively it purported to be applied; that it appeared from the agreements dated respectively the 23d of *August* 1836, and the 25th of *January* 1838, that the intention of the plaintiff and of the defendants respectively in making those several agreements was not as was in and by the seventh plea supposed, that the said annuity of 300*l.* agreed to be paid by the defendants to the plaintiff for the period of seven years, extendible at the option of the defendants to the further period of fourteen years, according to the said last two agreements, in lieu of the said annuity of 150*l.* a year covenanted to be paid by the articles of agreement in the first count also mentioned, during the said term of twenty-one years, determinable by the defendants as therein appeared at the expiration of the first seven or fourteen years thereof, was, like the annuity of 150*l.*, to cease, and not be payable to the plaintiff, nor to be demanded by him so long as the receipts of allowances by the plaintiff should amount to 400*l.* per annum; but, on the contrary thereof, such intention was and is, that the said annuity of 300*l.* a year was and is to be irrespective of, and over and above, all allowances whatsoever mentioned and stipulated for, in, and by the said several agreements, &c. Joinder in demurrer.

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The eighth plea — as to the first count, except so far as the same related to the nonpayment of 225*l.* parcel of the said alleged arrears of 750*l.*, and being the three quarterly payments of the said yearly sum of 300*l.* in the first count mentioned, was the same as the sixth plea, *mutatis mutandis.*

Special demurrer, assigning for causes, — that the plea was founded on the assumption that the sum of 700*l.* a year was the maximum fixed and ascertained by the agreements declared on in the first count, of the

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moneys receivable from the defendants according to the tenor and effect, true intent and meaning of those agreements; whereas by the true construction thereof, the said sum of 700*l.* a year was not the maximum fixed and ascertained thereby, of the moneys receivable by the plaintiff from the defendants, according to, &c. Joinder in demurrer.

Ninth plea, as to so much of the first count as related to the nonpayment of 225*l.* parcel of the said alleged arrears of 750*l.*, and being the three quarterly payments of the said yearly sum of 300*l.* in the first count mentioned, which became due and in arrear for the said last three quarters of a year of the said period of two years and a half in the first count mentioned, — that after the making of the promise of the defendants in the said first count mentioned, and during the said term of seven years from the 1st of *August* 1836, and also during the first seven years of the said term of twenty-one years in the articles of agreement mentioned, and before and during the period, for and during which the said sum of 225*l.* parcel &c., being such three last quarterly payments of the said yearly sum of 300*l.* as aforesaid, was in and by the said first count alleged to be in arrear and unpaid, and before the commencement of this suit, to wit on &c., divers, to wit, 500,000 gallons of brandy, were prepared and made by the defendants at the said works and premises in *Albany Street*, in the preparation and making whereof, the discovery, processes, and matters of the plaintiff and *Stumpf* in the first count mentioned and referred to, had been, and were used and employed, and divers large quantities, to wit, 20,000 gallons of such last-mentioned brandy had been and were sold, and sent out, to wit, from the works and premises last aforesaid by the defendants, during each of the three quarters of a year, and period of three months, for and

during which the said arrear of 225*l.* parcel &c. as aforesaid, was in and by the said first count alleged to be due and unpaid; that upon such brandy so sold and sent out as last aforesaid ——, the quantities whereof were duly taken and calculated at the respective times of sending out the same, and accounts taken of the same, to wit, quarterly, according to the several agreements in the said first count mentioned, — the plaintiff became and was entitled, according to the true intent and meaning of the agreements in the said first count mentioned, to the said allowance of 6*d.* a gallon, on each of the said gallons so sold and sent out by the defendants as last aforesaid; that such allowance to which the plaintiff was entitled, and which was payable to him as last aforesaid, in and for, and during each of the said three quarters of a year, and period of three months, for and during which the said arrear of 225*l.* parcel &c. as aforesaid, was so alleged to be due and unpaid as aforesaid, amounted to, and yielded to the plaintiff, a large sum of money, to wit, 500*l.*, which exceeded the sum of 175*l.*, being a quarter part of the said sum of 700*l.* in the said first count mentioned and referred to; of all which premises respectively, the plaintiff, at the respective times of the said alleged three last quarters' arrears of the said yearly sum of 300*l.* in the first count alleged to be unpaid, and amounting to the said sum of 225*l.* parcel &c. as aforesaid, respectively becoming due, and before the commencement of this suit, had notice; that by reason of the premises and of the plaintiff's having *relinquished* the said annuity of 150*l.* as in the first count alleged, and having been ready and willing to receive the said yearly sum of 300*l.* in lieu thereof, as therein also mentioned, such last-mentioned annuity of 150*l.*, during all the period for which the said sum of 225*l.* parcel of the said sum of 300*l.*, and of the said arrears thereof, as last

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aforesaid was claimed to be in arrear as aforesaid, wholly ceased to be payable to the plaintiff; that the defendants had always from the time of the last-mentioned allowances becoming due to the plaintiff as in that plea mentioned, been ready and willing to pay the plaintiff the full amount of the same; of which the plaintiff had always had notice; and that the defendants did in fact, *after* the commencement of the suit, to wit, on the 10th of *February* 1841, pay to the plaintiff the full amount of the said allowances in that plea mentioned. Verification, and prayer of judgment.

Special demurrer, assigning for causes, — that the plea was pleaded in bar of the maintenance of the action, generally, as to the causes of action in the introductory part thereof mentioned, yet it disclosed only grounds for contending that the *further* maintenance thereof ought to be barred; that the plea, in the body and substance thereof, fell short of that to which, by its introduction, commencement, and conclusion respectively, it purported to be applied; that the plea was founded on the assumption, that the sum of 700*l.* a year was the maximum, fixed and ascertained by the agreements declared on in the first count, of the moneys receivable by the plaintiff from the defendants, according to the tenor and effect, true intent and meaning of those agreements; whereas, by the true construction thereof, the said sum of 700*l.* a year was the minimum, fixed and ascertained thereby, of the moneys so receivable.

Joinder in demurrer.

Nov. 19. *Talfourd* Serjt. (with whom was *White*), in support of the demurrers. The effect of the agreements taken together was this,—that the plaintiff was to receive certain allowances upon spirits sent out by the defendants; and if those allowances did not exceed 400*l.* a year, he was to receive an annuity of 150*l.* a year. It certainly

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appears to be an extraordinary arrangement—that if the allowance amounted to 399*l.*, the plaintiff should receive, in addition, 150*l.*, but that if the allowance reached 400*l.* a year, he should receive nothing. Four questions arise upon these pleadings, one of those questions being material, the others formal. The material question is, whether the annuity of 300*l.* a year, mentioned in the agreement of 23d *August* 1836, is to be paid irrespectively of the sums receivable by the plaintiff as allowances, or whether, like the annuity of 150*l.*, it is to cease in the event of the allowances amounting to 400*l.* per year. [*Erskine* J. Or 700*l.* a year in one view of the case.] The 300*l.* a year is to be paid independently of allowances. That is perfectly clear from the language of the letter. The second plea is levelled at that construction. The plea is bad. Though pleaded to the whole declaration, it does not go to the whole cause of action. It is also bad as amounting to the general issue; denying the consideration is denying the agreement. *Wain* v. *Warlters* (*a*), and all that class of cases proceed upon the ground, that the consideration forms *part* of the promise. [*Tindal* C. J. The point, whether there is a consideration or not, arises upon the face of the agreement. You will say that, if a sufficient consideration does not appear, the defendants ought to have demurred.] The plaintiff says, that a perfectly good consideration is set out in the declaration. In *Longridge* v. *Dorville* (*b*), it was held that the giving up of a claim, although that claim was perfectly groundless, was a good consideration for an express promise. The same principle is recognised in courts of equity; *Penn* v. *Lord Baltimore* (*c*); *Stracey* v. *The Bank of England.* (*d*) Upon

(*a*) 5 *East*, 10.
(*b*) 5 *B. & Ald.* 117.
(*c*) 1 *Ves.* sen. 444. And see *Griffith* v. *Sheffield*, 1 *Eden*, 73.
(*d*) 6 *Bingh.* 754., 4 *Moore & Payne*, 639.

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general demurrer to a declaration, every thing is to be intended which will support the declaration. [*Channell* Serjt. The defendants mean to rely on the circumstance of what is called the last agreement, being merely a letter unaccompanied with any thing else. *Maule* J. Suppose it had not been called an agreement, the declaration alleges mutual promises, to perform the whole of the terms previously set out. *Channell* Serjt. The defendants are not interested in supporting the second plea, unless it is meant to be said that the letter is a substantive part of the declaration. *Tindal* C. J. Suppose the declaration to have been general, you could not have objected to the letter being given in evidence. *Maule* J. If the declaration had used the term "letter" instead of "agreement," would the objection have been maintainable? Could it have been pleaded, that there was no consideration for the *first line* of an agreement. *Channell* Serjt. Not unless that line formed an important part of the agreement. If it did, a plea that there was no consideration for that line would appear to be good. If the declaration incorporates the letter, the defendants would contend that the consideration of that letter was traversable. *Tindal* C. J. It may be *part* of an agreement. Suppose there had been an indorsement on the agreement, that a particular clause should be understood so and so; would it have been a good plea to say, that there was no consideration for that indorsement?] That disposes of the argument upon the third plea. It leaves it open to the defendants to contend in support of their other pleas, that the letter is not to be considered as part of the contract. The defendants contend that the plaintiff is not entitled to rely on the letter. Independently, however, of the letter, the articles of agreement can be understood only in the sense which that letter puts upon them; *Thornton*

v. *Fairlie* (*a*). *Gibbs* C. J. there says, "Still, however, it has been said, that there was no consideration for the promise, as no payment was, in point of fact, due. That part of the argument, however, may be left untouched, as there was, at all events, a sufficient colourable claim to freight." (*b*)

The next question arises upon the fourth and fifth pleas. It will be contended, that a release by deed, of the annuity of 150*l*., was contemplated by the parties, and that the execution of such a release was a condition precedent to the right of the plaintiff to take the benefit of the agreement. This is not so. The relinquishment of the annuity of 150*l*. contemplated, was not a release in law, but a relinquishment in fact. *Johnson* gives "the act of forsaking," as the import of the word "relinquishment." (*c*) But if a relinquishment under seal is necessary, the plaintiff has so relinquished the annuity of 150*l* by this deed-poll. [*Maule* J. The plaintiff may have disclaimed the annuity by matter of record. (*d*)] The real substantial questions are raised by the sixth, seventh, and the eighth and ninth pleas. The absurdity which exists in the first agreement, would be much increased by the construction contended for on the part of the defendants. [*Erskine* J. I think that, at the date

(*a*) 2 *B. Moore*, 397.

(*b*) *Ibid.* 409.

(*c*) *Johnson* gives no other exposition of the word "relinquishment;" but his second meaning of the verb "relinquish," "to quit, to release, to give up," is more favourable to the defendants' construction of the noun.

(*d*) At common law (before the decision of *Townson* v. *Tickell*, 3 *B.* & *Ald.* 31.), a freehold interest lying in livery could be disclaimed only in a court of record; a freehold interest lying in grant might be disclaimed by deed or by matter of record; a chattel interest (as this annuity for twenty-one years) or a use or a trust of any freehold, might be disclaimed either by parol, by deed, or by matter of record. *Butler and Baker's* case, 3 *Co. Rep.* 26. For the circumstances which led to the disregarding of these distinctions in *Townson* v. *Tickell*, see 4 *Mann.* & *Ryl.* 190.; *antè*, Vol. II. 701. n.

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of the first agreement, the plaintiff was entitled to 400*l.* absolutely.]

The declaration is good. The second plea is bad, as being addressed to part only of the contract. The last plea is also bad.

Channell Serjt. (with whom was *Stephen* Serjt.) *contrà*. The two substantial questions raised upon this record are, whether, according to the true construction of these agreements, the payment of the annuity was to cease upon the allowances reaching 400*l.* a year, or 700*l.* a year, assuming the letter of the 25th *January* 1838, to form part of the contract; or whether he was to receive *at least* 400*l.* or 700*l.* a year. Other points will, however arise. This action being brought to enforce the payment of an annuity, any defence which destroys the annuity for the time in respect of which the arrears are claimed, will be a good answer to the action. In the first instance the plaintiff was to have 150*l.* a year, and half the amount of the savings effected. It is not admitted that there is any absurdity in the contract. [*Maule* J. Would it have been agreed that the plaintiff should receive his 150*l.* per year if it had been considered that he was at liberty to transfer his services from the defendants to other persons?]

With respect to the second agreement, made thirteen months after the first, it is not material to see what is allowed to *Stumpf*, except for the purpose of shewing that the parties contemplated that the plaintiff should derive benefit from *Stumpf*. The two years mentioned in the articles of agreement had not then run out; but although no improvement had been made by either party, the 150*l.* a year is converted into 300*l.* As soon as the 150*l.* would cease, or be suspended, under the first agreement under seal, the 300*l.* a year would cease, or be suspended, under the second agreement.

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The plaintiff has declared for the nonpayment of the annuity of 300*l.* If the true construction of what has passed between these parties, is that the letter may be treated as surplusage, the defendants have no wish to support their second plea. But if the letter is to be considered as part of the subsisting agreement between the parties, that gets rid of any question as to the effect to be given to the particular language of the former contracts. It is not contended that the whole may not be one agreement, although the letter is introduced. But it is submitted, that a letter containing a mere voluntary exposition of the understanding of the parties as to the operation of an existing contract, is itself a new contract. [*Maule* J. A letter stating the terms of a contract, may itself form part of the agreement between the parties.] This letter purports not to be a proposal, but an exposition of a subsisting contract. [*Maule* J. If the letter contains a variation from the previous agreement, there is a sufficient consideration for the variance in its being adopted by each party; if it contain no variation the former contract stands.] The agreement is not to be performed within a year. If the declaration can be supported on the ground that the letter forms part of the contract, then the plea is good. The plea admits the facts stated in the count or counts to which it is pleaded, but avoids them. If this be a case within the statute of frauds, then the declaration is bad in not shewing any consideration; supposing it to be not within the statute it is still bad, because there is, in fact, no consideration. *Penn* v. *Lord Baltimore*, which has been cited, is very different from this case. *Longridge* v. *Dorville* is also distinguishable. In *Thornton* v. *Fairlie* a sufficient consideration was expressly stated upon the face of the agreement. *Stacey* v. *The Bank of England* was the case of a condition precedent.

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It does not appear there what the court would have held, if there had been no condition, or if the condition had been performed. [*Maule* J. The action was brought on the general liability; the defence was under the special agreement. After the cause of action had accrued, the parties entered into a contract upon a good consideration.] If the annuity was not to cease upon the allowances amounting to 400*l.*—as contended for under the plea,—it was to cease when the allowances reached 700*l.*; which is the right set up in the subsequent pleas. It would be sufficient if the plaintiff was only entitled to those allowances; but the seventh plea alleges actual payment.

Supposing this letter of the 25th of *January* 1828, to be a contract, it is not to be looked at *per se*. That letter refers to the contracts of 1835 and 1836. It should be read as in a parenthesis.

Upon the fourth and fifth pleas in which a relinquishment of the annuity of the 150*l.* is set up, the question is, what meaning the parties have attached to that term. This annuity was secured by deed; it could therefore be discharged only by an instrument of as high a nature; but the plaintiff has not shewn any release by deed. He was not in a situation to recover the annuity of 150*l.*, not because that annuity ceased to exist, but because it had been paid. He could not sue, because what had passed between the parties amounted to accord and satisfaction. The annuity was discharged by the parties acting upon the second agreement. If the declaration is to be understood as speaking of a relinquishment by deed, then the plea is good. It may be admitted that the defendants must fail upon this part of their case, if a release under seal is not necessary. The averment is that the plaintiff *has always relinquished*. It must therefore be assumed that upon the action being brought, the plaintiff immediately, on the record, relinquished the annuity. [*Maule* J.

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You assume the word "always" to be material. Suppose in this action the plea had stated, that in a former suit it had been pleaded that the plaintiff relinquished his right, and the plaintiff had admitted on the record that he had so relinquished?] In *Vooght* v. *Winch* (*a*) it was held that a verdict obtained by the defendant in a former action, which if properly pleaded would have operated as an estoppel, is, when given in evidence under the general issue, not conclusive, but merely evidence to go to the jury. (*b*) [*Maule* J. That does not apply to a case where the act done in court is the very thing which is the subject of inquiry.] If it is only cogent evidence, the defendants are not removed from the ground which they have taken in argument.

Talfourd Serjt. in reply. This was not an agreement which required the plaintiff's signature. But supposing such signature to be required, it would not be necessary to allege a signing in the declaration (*c*), however requisite it might be in a plea. [*Maule* J. The declaration, though it sets out the agreement, does not allege that it was signed by any party.] Supposing a written contract to be necessary, the mutual promises may be taken to have been in writing. The term "relinquishment" is preceded by clauses which give the plaintiff the benefit of the allowances. It is clear that when the second agreement was entered into, a considerable increase in the amount of these allowances was contemplated. It would be a perfect mockery to suppose that

(*a*) 2 *B. & Ald.* 662. And see *Outram* v. *Morewood*, 3 *East*, 365.; *Stafford* v. *Clark*, 2 *Bingh.* 381.; *Doe* v. *Huddart*, 2 *C. M. & R.* 316. 320.

(*b*) But see 5 *Nev. & M.* 212. (*b*). And see 2 *Mann. & R.* 581. (*a*).

(*c*) *Vide* 1 *Wms. Saund.* 211. b, n. (*i.*), 276. e. acc.; *Case* v. *Barber*, *Sir T. Raymond*, 450., *Com. Dig.* tit. *Action on the Case upon Assumpsit* (F. 3.)

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the intention of the parties was that the allowances should stop when they reached 400*l.* [*Maule* J. It would give the parties an interest to keep the allowances down.] If the letter be taken into consideration, the objection fails altogether. The 400*l.* was evidently to be the minimum. The plaintiff was to have as much more as the allowances exceeded that sum.

Cur. adv. vult.

Jan. 29. TINDAL C. J. now delivered the judgment of the court. This was an action of assumpsit, brought to recover the arrears of an annuity of 300*l.*; and in answer to the declaration, the defendants have put several special pleas on the record, upon which various questions have been raised and argued before us, on demurrer. But as the main and substantial question between the parties is, whether upon the legal construction of the documents set out in the declaration, the obligation to pay the 300*l.* subsisted and continued during the time for which the arrears are claimed, we shall, in the first place, consider, and give our judgment on, that point, which, in effect, will decide all the other objections raised on the record.

The declaration states three several documents; first, certain articles of agreement under seal, dated the 27th of *July* 1835, between the plaintiff of the first part, the defendant *Grimble* of the second part, and the defendant *Booth* of the third part, by which the defendants covenanted that *Grimble* should pay to the plaintiff annually, for twenty-one years determinable as thereinafter mentioned, 150*l.*, and certain further allowances per gallon on the sales of spirits therein mentioned and described; it being further agreed that when the amount of allowances to the plaintiff should exceed 400*l.* annually, then the annuity of 150*l.* should not be payable to him, nor should it be demanded by him so long as

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such receipts should amount to 400*l.* per annum. This deed also contained a guarantie on the part of the defendants, that after the lapse of two years, the receipts falling due to the plaintiff annually, should amount to 400*l.*, or, if they fell short in any year, the plaintiff should not be obliged to confine his attention or his secret to the defendants. The second instrument set out in the declaration is an agreement in writing, dated the 23d of *August* 1836, made between one *Stumpf*, the defendants, and the plaintiff, by which, *Stumpf* is constituted an agent to carry on the business at a certain distillery of the defendants, on certain stipulations therein, for the term of seven years, beginning from the 1st day of the same month of *August*; and in which agreement is contained a clause, that in consideration of the plaintiff's *relinquishing* the annuity of 150*l.* granted to him by the defendants by the former agreement, it is agreed on their part to pay him 300*l.* a year from the 19th of *July* then last, payable quarterly "during this contract in lieu thereof; and no rights, or benefits, or privileges belonging to the plaintiff not here set forth and given up, are relinquished by this agreement." The third document set out is called an agreement in writing between the defendants and plaintiff, being in fact in the form of a letter written by the defendants to the plaintiff, and dated the 25th of *January* 1838, in which the defendants state that,—to avoid any misunderstanding as to the meaning and interpretation to be put upon the articles of agreement of the 27th of *July* 1835, and the agreement of the 23d of *August* 1836, then existing between them, in regard to certain allowances to be made by the defendants to the plaintiff,—the defendants thereby declare that the plaintiff is entitled, under the deed of the 25th of *July* 1835, to 4*d.* per gallon on all spirits sold, and 6*d.* per gallon on all brandies sold, not to yield the plaintiff less than 400*l.* for every year, or to

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be made up to that amount, as well as any saving that may be effected, as set forth in that deed, and that the plaintiff is to be paid 300*l.* a year over and above all other allowances under the agreement of the 23d of *August* 1836, to yield him together not less than 700*l.* annually, and such further sum as the sales at 4*d.* and 6*d.* per gallon as above named, may amount to. The declaration then alleges mutual promises between the parties, and after averring performance on the part of the plaintiff, assigns as a breach the non-payment of the annuity of 300*l.* for two years and a half, commencing in *July* 1839.

It will be unnecessary at present to advert further to the pleas of the defendants, than to state that in some of those pleas the non-payment of the annuity of 300*l.* per annum is excused on the ground that the allowances which became payable to the plaintiff, and were paid to him upon the sale of spirits under the agreements, exceeded the sum of 400*l.* per annum during the time the arrears sought to be recovered accrued, and in other pleas, that the same allowance exceeded the sum of 700*l.* per annum; in either of which events, it is contended by the defendants, that the annuity of 300*l.* altogether ceased to be demandable during the continuance of such excess. The real question therefore between the parties is, what is the meaning of the contract upon which the action is brought. Is it a contract, as the plaintiff contends, that he is to have the 300*l.* per annum for the seven years mentioned in the agreement of 1836, altogether independently of, and without any reference to, the amount of allowances during that period. Or is it a contract, as the defendants contend, under which the plaintiff is to receive at the least 400*l.* per annum, or (supposing the letter forms part of the contract) 700*l.* per annum, but under which, in case the allowances exceed either of such sums, then he is to

receive his allowances only, whatever they may amount to, but that the annuity is to cease. And upon the best consideration we can give the question, we think the construction contended for by the plaintiff is that which is to be put upon the agreement.

As the defendants contend that the letter set out in the declaration constitutes no part of the agreement on which the action is founded, and that it is not admissible to explain any thing in the former agreement of 1836, in which, as it is alleged there is no room for doubt or ambiguity, the first inquiry ought to be, what is the proper construction of the agreement of 1836 when taken by itself. And we think that, if that agreement is construed without reference to the letter, it is not an unreasonable construction of it to hold that the plaintiff was to receive the 300*l.* per annum, independently of the amount of the allowances. At the time that agreement was entered into, the defendants had contracted to pay the plaintiff an annuity of 150*l.* a year, and certain other allowances, for twenty-one years. The new agreement that is entered into is to continue for seven years only, and the consideration expressed in it is, the plaintiff's *relinquishing* the former annuity, the stipulation being that he is to receive the 300*l.* per annum "in lieu of the 150*l.* during the contract;" and that no rights or privileges belonging to him and not set forth in the second contract, are to be relinquished thereby. We think it by no means clear, that in a contract made under these circumstances, the provision for determining the former annuity is necessarily to be imported into the second contract.

But if the contents of the agreement or letter of 1838 may be referred to, we think all doubt upon the subject is removed. The objection of the defendants is, that it forms no agreement at all, that it is a mere voluntary offer, entered into without any consideration, and, conse-

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quently, not binding either on the defendants or on the plaintiff. But it appears to us that the real contract between these parties is neither founded on the agreement of 1836 alone, nor on the letter of 1838 alone, but that it is to be inferred from both taken together; and that the objection urged by the defendants in argument, — which forms in fact the subject of their second plea, — that there is no consideration for the agreement of 1838, is untenable; for though it would be a good answer, by way of plea, to deny the existence of any consideration for the promise on which an action is brought, yet it can be none to deny such consideration as to one particular part of the transaction, or one single step or link out of many, from all which taken together the promise is inferred. As if a promise laid in a declaration is to be inferred from a long correspondence between merchants which is set forth upon the face of the declaration, it would be no plea to select one of the letters singly, and to plead that no consideration existed for that particular letter. And considering that letter as one of the documents out of which the agreement is to be inferred, we think the construction contended for by the plaintiff is placed beyond all doubt, namely, that the plaintiff is o receive the 300*l.* a year over and above the allowances, the sum of 700*l.* per annum being mentioned as a minimum only.

This construction of the contract will render any very minute consideration of the pleadings unnecessary. The second plea we consider bad in substance for the reason already given. As to the fourth plea, in which it is stated that the plaintiff did not *relinquish* the annuity of 150*l.* by any deed or instrument under seal, before part of the arrear became due, we consider that he was not called upon by the agreement so to do, but that the word "relinquish," which is not a word of art, is sufficiently satisfied by his abandoning, and not demanding

it. In fact very little evidence can be necessary to shew a relinquishing of an annuity of 150*l.* where the larger annuity of 300*l.* is claimed by the party in lieu and stead of it. The same observation will dispose of the fifth plea. And as to the remaining pleas they are all founded upon this, that by the agreement whenever the allowances exceeded 400*l.* per annum the annuity was to cease, which appears to us, for the reasons before given, to be not warranted by the proper construction of the agreement. We, therefore, give

Judgment for the plaintiff.

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ASSUMPSIT. The first count of the declaration stated that on the 25th of *March* 1839, by certain articles of agreement then made between the plantiff and the defendants, in consideration that the plaintiff, at the request of the defendants, then promised to convey by water, coals belonging to the defendants, from their vessels in the *Pool* of the river *Thames* to the works of the defendants in *Milbank*, for three years from the date thereof, upon the terms and under the conditions thereinafter mentioned, the defendants promised to employ the plaintiff in conveying, by water, coals belonging to the defendants, from their vessels lying in the said *Pool* to the said works of the defendants, for three years from the date thereof, upon the terms and under the conditions thereinafter mentioned. And in consideration of the premises and of the sum of 6*d.* per ton for each

Articles of agreement containing the terms of a contract, which is not to be performed within a year, purporting to be made between certain persons whose names are stated at the commencement of the articles, and who are described as the contracting parties,— concluded] with the words, "As witness our hands," without being followed by any name or signature. Held, not to be sufficiently signed within the statute of frauds.

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ton of coals conveyed by the plaintiff to the works of the defendants as aforesaid, the plaintiff, for himself his executors and administrators, promised the defendants that he his executors and administrators should forthwith, at his and their own costs and charges find good and sufficient barges, tight, staunch, substantial, and in every way fit for the conveyance of the said coals as aforesaid, dry and in good condition; and that on the plaintiff's receiving notice in writing on behalf of the defendants, of the arrival of any of the defendants' vessels laden as aforesaid, and of the place of mooring in the said *Pool* of every such vessel, he, the plaintiff should proceed to discharge such vessel at the rate of not less than forty-nine tons per day, the following working day from the receipt of such notice to be considered the first day of such ship's time; the plaintiff to be answerable for all loss or damage that might occur from the time of taking the coals alongside the vessel, until safely delivered at the defendant's wharf. And it was thereby further agreed that the plaintiff should, upon all occasions, report by letter to the secretary, &c.; the condition of the cargo of each vessel when delivered. And it was thereby further agreed, that in all cases where the vessels should be detained longer than the time limited in their respective charters through the neglect or default of the plaintiff, his executors or administrators, then the plaintiff, his executors and administrators should be answerable to the defendants for any claim or claims for demurrage, made and recovered by the owners of such vessel or vessels, provided such charter should not exceed the said rate of forty-nine tons per day: and should the defendants or their servants by any neglect in affording assistance or from unnecessary delay, detain any barge or barges beyond four clear working days in unloading, then the defendants should pay to the plaintiff demurrage for the detention aforesaid, at and after the rate of

5*s.* per day, day by day, as the same might become due and owing. And for the considerations aforesaid, the defendants did thereby agree with the plaintiff to pay the plaintiff or his executors and administrators, at the rate of 6*d.* per ton, for all such coals so conveyed by him as aforesaid; and also to provide sufficient berths and moorings for the loaded craft. Mutual promises. Averment of general performance on the part of the plaintiff, and that the plaintiff did upon the making of the said agreement find, and had always from the making of the said agreement, until the breach of the said agreement thereinafter mentioned, found, and still was ready and willing to find, and still had in perfect readiness in that behalf, at his own costs, good and sufficient barges, the same being tight, staunch, substantial, and in every way fit for the conveyance of all the said coals of the defendants mentioned in the said articles, dry and in good condition, which were after the making of the said agreement, to be conveyed in manner and form as in the said articles was mentioned, and had always been ready and willing to convey the said coals in manner and form, and upon the terms and under the conditions in the said articles made, for the space of three years therein mentioned. Of all which several premises the defendants had always from the making of the said agreement had notice. Breach, that although the defendants did employ the plaintiff in conveying the said coals in manner and form, and upon the terms and under the conditions in the said articles mentioned for a certain part of the said space of three years, to wit, from the making of the said agreement until the 15th day of *September* 1840; and although the defendants had at the breach of the agreement thereinafter mentioned, and from thence until, &c., divers large quantities of coal on board of their vessels in the said *Pool* which were to be conveyed from thence to the works of the defendants at *Milbank* aforesaid, and which they caused

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to be conveyed thereto, but not by the plaintiff or in his barges, and which might and, but for the breach of agreement thereinafter mentioned would, have been conveyed by the plaintiff in his said barges in manner and form, and upon the terms and under the conditions in the said agreement mentioned; yet the defendants did not, nor would, employ the plaintiff in conveying their said coals in manner and form, and upon the terms and under the conditions, and for the whole of the time, in the said agreement mentioned, although requested by the plaintiff so to do, to wit, on the 16th of *September* 1840; but on the contrary thereof, the defendants afterwards, and long before the said space of three years had expired, to wit, on the day and year last aforesaid, wrongfully refused to employ the plaintiff in conveying, or to permit and suffer the plaintiff to continue conveying their said coal in and on board the said ships of the defendants in the said *Pool*, in manner and form, and upon the terms and under the conditions in the said agreement mentioned; and then wholly hindered and prevented the plaintiff from so doing, and continued to refuse, and still did refuse to employ the plaintiff in conveying, or to permit and suffer the plaintiff to continue conveying the said coals of the defendants, in manner and form, and upon the terms and under the conditions, in the said articles mentioned, or to permit and suffer the plaintiff to perform and complete the said promise on his part to be performed. By means whereof the plaintiff lost, and was deprived of, divers great gains and profits, which would otherwise have arisen and accrued to him, the plaintiff, from continuing to convey the said coal, in manner and form, and upon the terms and under the conditions in the said memorandum mentioned, and from the completion of the said agreement; and he, the plaintiff, had been put to, and incurred, great expenses, amounting to a large sum of money, to wit,

500*l.* in fitting up, &c. divers, to wit, forty barges, for the purpose of performing and completing the said agreement; the same barges being fit for the conveyance of the coals of the defendants for the said space of three years, and which barges then became and were thereby of little or no value or use to the plaintiff; and that the plaintiff was and is otherwise damnified.

The second count stated that, on the 22d of *March* 1839, by a certain other memorandum of agreement made between the plaintiff and the defendants, in consideration that the plaintiff, at the request of the defendants, then promised to lighter coals for the defendants from the side of certain ships in the said *Pool*, to the defendants' wharf, at the *Thames Bank, Vauxhall Bridge*, for three years, for 6*d.* per ton; the defendants promised to employ the plaintiff to lighter coals for the defendants from the side of such ships in the said *Pool*, to the defendants last mentioned wharf, for three years, for 6*d.* per ton. Mutual promises. Averment of general performance by the plaintiff, and that he had always been, and still was, willing and ready to lighter such coals for the defendants, from, &c., to, &c., for the said space of three years, upon the terms in the last mentioned memorandum contained. Of all which premises, the defendants had always, from the making of the said agreement, had notice. Breach, that although the defendants did employ the plaintiff in conveying such coals for the defendants for a certain part of the last mentioned space of three years, to wit, from the making of the said agreement, until the 15th of *September* 1840, and although the defendants had, at the time of the breach of agreement thereinafter mentioned, and from thence until the commencement of the suit, divers large quantities, to wit, &c., of coal in and on board other of the said ships in the said *Pool*, which were to be conveyed from thence to the place aforesaid, and which the defendants caused to be conveyed thereto, but not by the plaintiff, and

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which might, and which but for the breach of the said agreement thereinafter mentioned would, have been conveyed thereto by the plaintiff, as in the said last mentioned articles contained; yet the defendants did not, nor would, employ the plaintiff in lightering the said coals for the defendants, from the side of the said ships lying in the said *Pool*, to the place aforesaid, as in the said agreement mentioned, for the whole of the said space of time in the said agreement mentioned, to wit, for the said space of three years, although requested by the plaintiff so to do, to wit, on the 16th of *September* 1840; but, on the contrary thereof, afterwards, and long before the said space of three years from the date of the last mentioned articles had expired, to wit, on the day and year last aforesaid, the defendants wrongfully refused to employ the plaintiff in lightering, or to permit or suffer the plaintiff to continue lightering coals for them, as in the last-mentioned memorandum is contained, and then wholly hindered and prevented the plaintiff from so doing, and continued to refuse, and still did refuse to employ the plaintiff in lightering, or to permit and suffer the plaintiff to continue lightering, the said coals for the defendants, as in the last-mentioned articles in that behalf contained, or to permit and suffer the plaintiff to perform and complete the last-mentioned promise on his part to be performed. By means whereof the plaintiff had lost and been deprived of divers great gains and profits which he otherwise would have made and had.

Third count, for lighterage.

Fourth count, upon an account stated.

Pleas: to the first and second counts, non assumpsit (*a*); to the third and fourth counts, payment of 35*l.* 17*s.* 6*d.* into court, and *non damnificatus ultrà*.

(*a*) To these counts the defendants also pleaded six special pleas, upon which the plaintiff took issue. At the trial all these pleas were abandoned by the defendants.

The plaintiff joined issue upon the first plea, and confessed the sufficiency of the payment mentioned in the second plea.

At the trial before *Coltman* J. at the *Middlesex* sittings after last *Trinity* term, the following facts appeared. Previously to the making of the articles of agreement declared on, an unincorporated company called "The Equitable Gas Light Company," accepted a tender from the plaintiff for conveying their coals from ships in the *Pool* to their works at *Thames Bank Wharf*, for three years from *Lady-day* 1839. A draft of articles of agreement was accordingly prepared by order of the directors of the company, and the following minute was entered in their books:—"2d of *April* 1839. The agreement between the company and Mr. *Thomas Hubert*, for carrying our coals from ships in the *Pool* to *Thames Bank Wharf*, for a period of three years was read and approved, and a fair copy thereof directed to be forwarded to Mr. *Hubert*."

The articles were as follows: "Articles of agreement made, concluded, and fully agreed upon, this 25th day of *March* 1839, between *Thomas Hubert* of *Millbank Street*, in the city of *Westminster*, lighterman, of the one part, and *Edmund Treherne*, *Walter Hawkins*, and *Nathaniel Saxon*, trustees and directors of The Equitable Gas Light and Coke Company, of the other part: Whereas the said *T. H.* has agreed with the said *E. T.*, *W. H.*, and *N. S.*, acting herein on behalf of The Equitable Gas Light and Coke Company, to convey by water coals belonging to the said company, from their vessels lying in the *Pool* of the river *Thames* to their works at *Millbank*, for three years from the date of these presents, upon such terms and conditions as are hereinafter mentioned: Now these presents witness, that in consideration of the sum of 6*d.* per ton, for each and every ton of coals conveyed by

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the said *T. H.* to the said company's works as aforesaid, the said *T. H.* for himself, his executors, and administrators, doth agree with the said *E. T.*, *W. H.*, and *N. S.* acting herein as aforesaid, or their successors and assigns, in manner following, that is to say, that the said *T. H.*, his executors or administrators, shall and will forthwith, at his or their own costs and charges, find good and sufficient barges, tight, staunch, substantial, and in every way fit for the conveyance of the said coals, as aforesaid, dry and in good condition, and that the said *T. H.* receiving notice in writing from the broker, or other person on behalf of the company, of the arrival of any of the company's vessels laden as aforesaid, and of the place of mooring in the *Pool* of every such vessel, he shall proceed to discharge such vessel at the rate of not less than forty-nine tons per day, the following working day from the receipt of such notice to be considered the first day of such ship's time; the said *T. H.* to be answerable for all loss or damage that may occur from the time of taking in the coals alongside the vessel, until safely delivered at the company's wharf. And further, that the said *T. H.* shall, upon all occasions, report by letter to the secretary or other person appointed by the said company, the condition of the cargo of each vessel when delivered. It is further agreed, that in all cases where the said vessels shall be detained longer than the time limited in their respective charters, by or through the neglect or default of the said *T. H.*, his executors and administrators, the said *T. H.*, his executors and administrators, shall be answerable to the said company for any claim or claims for demurrage made and recovered by the owners of the said vessel or vessels, provided such charter shall not exceed the said rate of forty-nine tons per day. And should The Equitable Gas Light Company, or their servants, by any neglect

in affording assistance, or from unnecessary delay, keep or detain any barge or barges beyond four clear working days in unloading, the said company shall pay to the said *T. H.* the demurrage for the detention aforesaid, at and after the rate of *5s.* per day, day by day, as the same may become due. And for the considerations aforesaid, the said *E. T.*, *W. H.*, and *N. S.* do hereby, on behalf of the said company, agree with the said *T. H.*, his executors, and administrators, to pay him or them at the rate of *6d.* per ton, for all such coal so conveyed by him or them as aforesaid, and also to provide good and sufficient berths and moorings for the loaded craft. And for the due performance of this agreement, each of the said parties hereto, bindeth and bind himself and themselves unto the other and others of them, by these presents. As witness our hands."

These articles were not subscribed by the plaintiff (*a*), or by the defendants, or by any other person. From *April* 1839 to *September* 1840, the terms contained in the above articles were acted upon on both sides, but from the latter period the company having, in their contracts for coals, made them deliverable by the shipper, free of all charge, at their works at *Vauxhall Bridge*, ceased to employ the plaintiff; and one cargo had been so delivered before the commencement, in *October* 1840, of the present action. It was objected on the part of the defendants, that the agreement being one which was not to be performed within the year, a note in writing, duly signed, was necessary under the statute of frauds. The learned judge overruled the objection, but reserved the point. A verdict having been found for the plaintiff, damages 150*l*,

(*a*) As to the necessity of signature by the person contracting with the party sought to be charged, see *antè*, 462.

said, the said *T. H.* for himself, his executors, and administrators, doth agree with the said *E. T.*, *W. H.*, and *N. S.* acting herein as aforesaid, or their successors and assigns, in manner following, that is to say, that the said *T. H.*, his executors or administrators, shall and will forthwith, at his or their own costs and charges, find good and sufficient barges, tight, staunch, substantial, and in every way fit for the conveyance of the said coals, as aforesaid, dry and in good condition, and that the said *T. H.* receiving notice in writing from the broker, or other person on behalf of the company, of the arrival of any of the company's vessels laden as aforesaid, and of the place of mooring in the *Pool* of every such vessel, he shall proceed to discharge such vessel at the rate of not less than forty-nine tons per day, the following working day from the receipt of such notice to be considered the first day of such ship's time; the said *T. H.* to be answerable for all loss or damage that may occur from the time of taking in the coals alongside the vessel, until safely delivered at the company's wharf. And further, that the said *T. H.* shall, upon all occasions, report by letter to the secretary or other person appointed by the said company, the condition of the cargo of each vessel when delivered. It is further agreed, that in all cases where the said vessels shall be detained longer than the time limited in their respective charters, by or through the neglect or default of the said *T. H.*, his executors and administrators, the said *T. H.*, his executors and administrators, shall be answerable to the said company for any claim or claims for demurrage made and recovered by the owners of the said vessel or vessels, provided such charter shall not exceed the said rate of forty-nine tons per day. And should The Equitable Gas Light Company, or their servants, by any neglect

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Bompas Serjt. (with whom was *Addison*), in support of the rule. The form of the articles of agreement shews that the insertion of the names in the body of the instrument was not intended as a *signing* of the articles. In *Saunderson* v. *Jackson* and in *Schneider* v. *Norris* there was a subsequent recognition of the particular instrument in which the name had been inserted. Here, there is no such recognition. The case more nearly resembles *Hawkins* v. *Holmes* (*a*) and *Stokes* v. *Moore*. (*b*)

TINDAL C. J. It appears to me that this is not an agreement which is binding within the statute of frauds. By the fourth section of that statute "No action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

I am not satisfied that there is in this case any signature at all. The names of the parties necessarily appear in the body of the instrument, which would not otherwise be intelligible. To hold that the mere introduction of the names of the parties was sufficient, would be almost to repeal the statute. Suppose this agreement had been prepared not by the secretary of the company, but by their attorney; could it have been contended that

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&c., but subscribed only by the vendee, was binding on the vendor. *Acc. Vinnii Instit. Heineccii*, 292. n. 2.; *Lemayne* v. *Stanley*, 3 *Mod.* 219., 3 *Lev.* 1.; *Townshend* v. *Pearce*, 8 *Vin. Abr.* 142. pl. 3. And see 1 *Fonbl. Tr. Eq.* 190.; *Allen* v. *Bennett*, 3 *Taunt.* 169.; *Welford* v. *Beezeley*, 1 *Wils.* 118., 3 *Atk.* 308., 2 *Ves.* sen. 6.; *Cooke* v. *Tombs*, 2 *Anstr.* 420.

(*a*) 1 *P. Wms.* 770.

(*b*) *Ib.* 770. n. But as to *Stokes* v. *Moore*, see what is said in *Coles* v. *Trecothick*, 1 *J. P. Smith*, 243, 244.

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the insertion by him of his clients' names would have been a signature within the statute? Yet I am not aware that the power of an attorney differs from that of a secretary or any other person who may be employed to prepare such an instrument. Then look at the form of these articles of agreement, which conclude thus: "As witness our hands." These words evidently shew that the names of the contracting parties were meant to be subscribed, and that it was not intended that the insertion of the names in the body of the instrument should operate by way of signature. *Saunderson* v. *Jackson* depends for its authority more upon the subsequent recognition than upon the printed names. In this case there is no sufficient original signature, and there is no subsequent recognition. Care ought to be taken, in interpreting the statute of frauds, that its efficacy shall not be destroyed, by admitting one exception after the other, each case being weaker than that by which it was preceded.

COLTMAN J. It is very important that this statute should not be frittered away. Here, it appears that it was intended that the signature of the parties should be affixed. This differs from the case of a bill of parcels delivered out in the usual manner as a complete and perfect instrument. It is said the parties treated the articles of agreement as a perfect instrument. It is not certain that the plaintiff saw the articles; and there was no sufficient evidence of any authority to give out the copy on behalf of the directors. This case falls short of those which have been cited.

ERSKINE J. I also am of opinion that this rule should be made absolute for entering a nonsuit. It does not appear that these articles of agreement were signed by the defendants, or by an agent thereunto lawfully

authorised by them. We cannot help seeing that it was intended that the signature of the parties should be added.

I am not, however, prepared to say that if it had been shewn that there was authority to give out the fair copy of the articles, the names inserted at the commencement of the instrument, would not have been sufficient. But there was no evidence that the company had issued the instrument as a perfect agreement. It was not shewn that the secretary had any authority from the directors to transmit the fair copy to the plaintiff. There was therefore no evidence of an agreement in writing signed "by the party to be charged or by some other person by him thereunto lawfully authorised."

MAULE J. I also think that the plaintiff has failed in the proof of a written agreement. It is admitted that this is a case within the fourth section of the statute of frauds. The plaintiff was bound therefore, under the issue upon non assumpsit, to shew that there was an agreement in writing signed by the party to be charged, or his agent. In cases of this description two questions may occur — first, whether the agreement contains that which the statute of frauds requires, — which is a question of law; secondly, whether the agreement has been signed by the party to be charged therewith or by a person authorised by such party so to do, — which is a question of fact. I think this rule should be made absolute on the first point. The articles of agreement of the 25th of *March* 1831 do not seem to me to be a memorandum signed by any body. Before the statute of frauds no one could have entertained a doubt upon that point. Since the statute the courts, anxious to relieve parties against injustice, have not unfrequently stretched the language of the act. But none of the cases hitherto

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decided under this statute have gone so far as the present. If a party writes "I, *A. B.* agree with *C. D.*," &c., with no such conclusion as is found here, "As witness our hands," it may be that this is a sufficient signature, within the statute, to bind *A. B.* So, where the seller's name appears in a bill of parcels which he fills up and delivers out as a complete and perfect contract; or where a party, authorised so to do, issues an instrument containing the printed name of the principal. But it would be going a great deal further than any of the cases have hitherto gone, to hold that this was an agreement signed by the party to be charged. This is no more than if it had been said by *A. B.* that he *would* sign a particular paper.

Rule absolute.

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FIELD *v.* THOMAS POOLEY and ALEXANDER POOLEY.

In assumpsit against two acceptors of a bill of exchange, judgments against each are obtained by default. Separate rules to compute are irregular, although, at the time the first rule was granted, judgment had been obtained against one defendant only.

ON the 23d of *December* 1841, a writ of summons in an action upon promises, was served on the defendant *Alexander Pooley*, who refused to accept service for the defendant *Thomas*. A copy of the writ was left with the attorney of *Thomas Pooley*, who entered an appearance for him on the 7th of *January*, on which day a declaration against both the defendants as acceptors of a bill of exchange, with notice to plead in four days, was delivered to the attorney who had appeared for *Thomas Pooley*. On the 12th, the plaintiff signed judgment by *nil dicit* against *Thomas Pooley*. On the 18th, an order was made by *Coltman* J., for entering an appearance for *Alexander Pooley*, *nunc pro tunc*. On the 15th, *Manning* Serjt. moved for a rule to compute principal

and interest upon the bill under the judgment so signed against *Thomas Pooley*. A rule nisi was granted; *Tindal* C. J. saying "you may take it at your own risk." On the 17th, the plaintiff entered an appearance for *Alexander Pooley* and signed judgment against him by *nil dicit*. On the 19th a rule nisi was obtained by *Shee* Serjt. to set aside the declaration, the judgment against *Thomas Pooley*, and the rule to compute thereon, also the order for entering an appearance for *Alexander Pooley*, and the appearance entered in pursuance of such order, and the judgment signed against him. On the 26th, a rule nisi was obtained by *Manning* Serjt. to compute, upon the judgment against *Alexander Pooley*.

Manning Serjt now shewed cause against the rule obtained by *Shee* Serjt., and moved to make his own rule absolute. The proceedings on the part of the plaintiff are regular. Upon the default made by *Thomas Pooley*, the plaintiff was entitled to sign judgment against him alone, *Alexander Pooley* not being then in court. He was not bound to wait until *Alexander Pooley* should appear, and he was therefore justified in proceeding to ascertain the amount, for which *Thomas Pooley* was liable. As *Alexander Pooley* would not be bound by the reference to the master as against *Thomas Pooley*, or by the allowance of costs against *Thomas Pooley* under that reference, the plaintiff was justified in obtaining a rule to compute against *Alexander Pooley* also, as soon as judgment had been signed against him.

Shee Serjt., in support of his rule. A plaintiff cannot sign two separate judgments, and obtain two rules to compute, in a joint action. The declaration against both these defendants, before *Alexander Pooley* had appeared, was irregular.

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TINDAL C. J. The separate rules to compute are clearly irregular. That part of the present rule which prays that the rule to compute, obtained as against *Thomas Pooley* should be set aside, must be made absolute. As to the other matters prayed for, the rule must be discharged. I think that there should therefore be no costs.

ERSKINE J. Separate judgments may be signed against each defendant, but there can be only one rule to compute.

MAULE J. There cannot be separate rules to compute, any more than there can be separate writs of inquiry, against joint defendants.

It was suggested by the court, that in order to avoid the necessity of a separate application on the part of *Alexander Pooley*, it would be better for the plaintiff to consent to the discharge of both rules to compute.

Rule absolute accordingly. (*a*)

(*a*) And see *Figgins* v. *Ward*, 4 *Tyrwh.* 282., 2 *Cro. & M.* 424., 2 *Dowl. P. C.* 364.

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ASSUMPSIT. First count that before and at the time of the making of the agreement, and of the promise of the defendant thereinafter mentioned, the plaintiff was the owner of a certain mare, called *Matilda*, and one *William Ryley* was the owner of a certain brown mare, then late the property of the defendant; that thereupon, on the 27th of *February* 1841, it was agreed between the plaintiff and the defendant, that a race of four miles *across a country* should be run between the said mares of the plaintiff and *Ryley*, each mare carrying 13 stone; that the said race should come off on the 1st of *March* in the year aforesaid; that one *Thomas Holyoake* Esq. should be the umpire of the said race, and that his decision should be final; that it was further agreed between the plaintiff and defendant, that if the said mare of the plaintiff, in running the said race, should beat the said mare of *Ryley*, the defendant should pay to the plaintiff 100*l.* play or pay; but that if the said mare of *Ryley*, in running the said race, should beat the said mare of the plaintiff, the plaintiff should pay to defendant 25*l.*, play or pay mutual promises. Averment: that afterwards, to wit, on the 1st of *March* in the year aforesaid, the said race was run between the said two mares, each mare carrying 13 stone; and that in running the said race, the said mare of the plaintiff beat the said mare of *Ryley*, and that the said umpire decided that the

A steeplechase for 50*l.* or upwards is a lawful race.

Upon an unstamped paper bearing two agreements between *A.* and *B.*, *A.* procures one agreement stamp to be affixed for the purpose of an action upon one of the agreements. Held, sufficient to render the paper admissible in evidence in such action, although the other agreement had been acted upon.

In a memorandum respecting a race, the race is described as "four miles across a country." Held, that evidence was admissible to shew that "across a country" means that the riders are to go over all obstructions, and are not at liberty to avail themselves of an open gate.

Where, in such a memorandum, an umpire is appointed, and it is stipulated that "the decision of the umpire is to be final," it is not competent to either party to dispute the umpire's decision.

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said mare of the plaintiff had beaten the said mare of *Ryley*, and had won the race; whereof the defendant then had notice. Yet the defendant had not paid the said 100*l.*, nor any part thereof, although often requested so to do, but had wholly neglected and refused, and still neglected and refused so to do. Second count upon an account stated.

Pleas — first, non assumpsit — secondly, to the first count, that the mare of the plaintiff did not beat the mare of *Ryley; modo et formâ;* concluding to the country — thirdly, to the first count, that the race in that count mentioned was not a legitimate *bonâ fide* horse race, run by the said mares upon or over any race-course or race-ground; but, on the contrary, the same was a steeple-chase, run by the said mares across the country over divers closes, fences, drains, and hedges, the same being a mode and manner of racing other and different from the mode and manner of horse-racing used and practised under and according to the statutes in that behalf; and that by reason of the premises the contract in the declaration mentioned was wholly void in law. Verification.

The plaintiff joined issue upon the first two pleas; and replied to the third plea, that the race in the first count mentioned was a legitimate *bonâ fide* horse-race run by the said mares after the mode and manner of racing used and practised under and according to the statutes in that behalf made and provided; concluding to the country. Upon which issue was joined.

At the trial, before *Coltman* J., at the last *Shrewsbury* assizes, the plaintiff, in support of the affirmative of the first issue, put in and proved his own and the defendant's signature to the following memorandum: —

"*Pratt* and *Evans*.

"*Thomas Holyoake*, Esquire, umpire.

"*Frederick Pratt* bets *Thomas Evans* 100*l.* to 25*l.*,

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P. P. (play or pay) Mr. *Ryley's* brown mare (late his property) beats *Thomas Evans's* mare *Matilda*, four miles *across a country*, thirteen stone each. To come off 1st *March* 1841. The umpire's decision to be final.

"*Thomas Evans*,
"*Frederick Pratt*."

On the same paper appeared another memorandum of a wager between the parties upon the defendant's riding a certain horse "from the gas-pillar in *Wolverhampton* to the four-milestone between *Stafford* and *Stone* in one hour." This wager had been won by the defendant, who therefore claimed and received the 50*l.* from the plaintiff.

This paper bore one agreement stamp, which had been affixed by the commissioners for the purposes of this action upon payment of the penalty.

In support of the affirmative of the second issue, the plaintiff proved, by Mr. *Holyoake*, the umpire, that the race mentioned in the memorandum was run on the day appointed; that Mr. *Ryley's* brown mare came in first; but that he, the umpire, decided that the plaintiff's mare was the winner, as the former had passed through a gateway instead of going over the hedge, as required by the rules of steeple-chasing.

Ludlow Serjt., for the defendant, objected that the agreement stamp must be considered to apply to the contract which had been executed; and that the testimony given by Mr. *Holyoake* was at variance with the terms of the memorandum; and that a *steeple-chase* was not legalized by the 13 *G.* 3. *c.* 19. and 18 *G.* 2. *c.* 34. but was an unlawful gaming within the 16 *Car.* 2. *c.* 7. and 9 *Ann. c.* 14.

The learned judge overruled these objections, but reserved the points; and the jury returned a verdict for the plaintiff, damages 100*l.*

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In *Michaelmas* term last, *Ludlow* Serjt., moved for a rule to shew cause why a nonsuit should not be entered according to the leave reserved, or why the judgment should not be arrested. The defendant is entitled to the entry of a nonsuit upon two grounds. First, the single stamp upon the paper containing two agreements was insufficient. In *Powell* v. *Edmunds* (*a*) the same paper contained separate contracts for the purchase of different lots by different persons. One stamp impressed on that part of the paper on which the agreement declared upon was written was held sufficient. But it did not appear in that case that any contract for any other lot had been acted upon, and the receipt for the penalties was given in the name of the plaintiff's attorney.

TINDAL C. J. No action having been brought upon the other wager, the stamp must be taken to have been impressed with reference to that which forms the subject of the present action.

MAULE J. No stamp was required in respect of the other agreement, which was performed without suit.

Secondly, the parol evidence was at variance with the written contract, and ought not to have been admitted. In *Powell* v. *Edmunds* evidence that the auctioneer, at the time of a sale of trees, verbally warranted that the lot contained a certain quantity of timber, was held to be inadmissible, as the effect of receiving it would be to alter the written contract.

TINDAL C. J. The contract declared upon, and proved by the memorandum produced was that the horses were to run four miles "across a country." That is an ex-

(*a*) 12 *East*, 6.

pression of which we cannot take judicial notice. The meaning of that expression was a question for the jury, to be decided by them upon the evidence before them. The evidence shewed that by this expression, the rider is excluded from riding through an open gate.

There is another answer to this objection. The parties had agreed that the decision of the umpire should be final, and he has decided in favour of the plaintiff.

Ludlow Serjt. A steeple-chase is not a race within the statutes permitting horse-races. The 13 *G.* 2. *c.* 19. contemplates only such races as are run at *Newmarket*, or at *Black Hambleton*. The provisions of the act of 13 *G.* 2. *c.* 10. were extended by the 18 *G.* 2. *c.* 34. *s.* 11. But that extension is repealed by 3 & 4 *Vict. c.* 5. Even whilst the former statutes were in full operation, this court appears to have considered that "racing on the turf" was alone legalized. *Whaley* v. *Pajot* (*a*).

TINDAL C. J. There may be some doubt upon the construction of the statutes. You may therefore take a rule nisi to arrest the judgment.

Talfourd Serjt. now shewed cause. No objection can be taken to the amount of the stake in this case; for though the 13 *G.* 2. *c.* 19. prohibits races for a less stake than 50*l.*, it has been held that 25*l.* each side, constitute a stake of 50*l.* (*b*) or rather, as shewn in the note at the end of the report (*c*), 30*l.* was staked by *Bidmead*, the plaintiff, against 20*l.* staked by *Gale*, the defendant.

The real question between the parties is, as to the legality of what is called a steeple-chace. This will turn upon the construction of the 13 *G.* 2. *c.* 19., which

(*a*) 2 *Bos. & Pull.* 51.
(*b*) 4 *Burr.* 2432., 1 *W. Bla.* 671.
(*c*) 4 *Burr.* 2433.

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enacts (s. 5.) that no person shall "start or run any match with or between any horse, mare, or gelding for any sum of money, plate, prize, or other thing whatsoever, unless such match shall be started or run at *Newmarket Heath* in the counties of *Cambridge* and *Suffolk*, or *Black Hambleton* in the county of *York*, *or* the sum of money, plate, prize, or other thing, be of the real and intrinsic value of 50*l.* or upwards. And in case any person or persons shall start or run any such match at any other place than *Newmarket Heath*, or *Black Hambleton* aforesaid, or (*a*) for any plate, prize, sum of money, or other thing of less value than 50*l.*, every such person or persons shall forfeit and loose the sum of 200*l.*" By the 18 *G.* 2. *c.* 34. *s.* 11., it is enacted, "that it shall and may be lawful for any person or persons, to run any match, or to start or run for any plate, prize, sum of money or other thing, of the real and intrinsic value of 50*l.* or upwards at any weight whatsoever, and at any place or places whatsoever, without incurring or being liable to the penalty or penalties in the said act of the thirteenth year of his majesty's reign, relating to weights as aforementioned, and in the same manner as might have been done, if the said act had never been made." The provisions of 13 *G.* 2. *c.* 19., as to horse-racing, are repealed by 3 & 4 *Vict. c.* 5., in which it is recited that doubts had arisen as to the meaning of certain clauses in the said act relating to the subject of horse-racing, and that several persons not intending to offend against the provisions of the said act had been subjected to vexatious proceedings at law. The object of that enactment was to stay the proceedings, and to indemnify those against whom such vexatious actions had been brought. [*Maule* J. Not to punish persons for doing that which the legislature had encouraged them to do.] The legislature acted

(*a*) The word "or" should be read, "and" to correspond with the preceding clause.

differently with respect to actions against incumbents for non-residence. (*a*) If the 13 *G.* 2. *c.* 19. were the only act legalizing horse-races, some doubt might perhaps be felt; but the statute now in force is the 18 *G.* 2. *c.* 34., and the only question is, whether such a race as this comes within the protection of that act. *Whaley* v. *Pajot* was not a horse-race at all; it was a wager that one horse should run on the high road from *London* to *Sittingbourne*, and arrive sooner than one of two other horses placed at any distance the owner might please. What was said by Lord *Eldon* in that case as to running on the turf, was extra-judicial; it was introduced without any necessity and would amount to a new charter of horse-racing. All distinctions as to the mode of conducting a horse-race were swept away by the 18 *G.* 2. *c.* 34. The court cannot take judicial notice of what is or what is not a race-course. In *Ximenes* v. *Jaques* (*b*) a wager that the plaintiff would perform a certain journey in a post-chaise with a pair of horses, was held illegal; but that was not a race between horses, but a wager against time. [*Tindal* C. J. This is less a trial of speed between the horses, than of skill in the riders. *Maule* J. The term horse-race in the statute may mean a race between horses from one point to another point. *Tindal* C. J. It will turn upon the construction to be put upon "place or places" in the statute. *Erskine* J. This would be a trial of the strength of the horses.]

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Ludlow Serjt. (with whom was *Lee*), in support of the rule. The 13 *G.* 2. *c.* 19. is most distinctly repealed by 3 & 4 *Vict. c.* 5. But then it is said, on the part of the plaintiff, that the 3 & 4 *Vict. c.* 5. does not affect the 18 *G.* 3. *c.* 34., upon which reliance is placed, as a new charter to horse-racing. That statute, however, merely

(*a*) *Vide* 54 *G.* 3. *c.* 54. *s.* 3.; *Wynne* v. *Budd*, Clerk, 5 *Taunt.* 629.

(*b*) 6 *T. R.* 499.

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relieves parties from penalties incurred under the previous statute. The 18 *G.* 2. *c.* 34., contains no extension as to the places of starting. [*Maule* J. What effect do you give to the words "at *any* place or places"?] The context shews that these words were introduced merely for the purpose of dealing with penalties which might have been incurred. For any thing that appears to us, the four-mile course at *Newmarket* might be "across a country" (*a*). [*Maule* J. The stake being 100 guineas, the case would appear to be out of the prohibition of the statute of *Charles*.] *Ximenes* v. *Jaques*; *Whaley* v. *Pajot*; *Shillito* v. *Theed*. (*b*)

TINDAL C. J. The difficulty thrown upon us by the argument in support of this rule would be, the conclusion at which we should be obliged to arrive if that argument is correct. If the objection now taken by my brother *Ludlow* were well founded, no race for any sum, or run at any place, would be a legal race. The 9 *Ann. c.* 14. has been held to apply to horse-races. If therefore the 18 *G.* 2. *c.* 19. is the only act legalising horse-races, that act having been repealed by 3 & 4 *Vict. c.* 35., it follows that all horse-races must be illegal.

The object of the 18 *G.* 2. *c.* 34. was rather to legalise races which did not strictly come within the protection of the 13 *G.* 2. *c.* 19. I cannot help thinking that the law with respect to horse-racing now stands upon the true construction to be put upon the 18 *G.* 2. *c.* 34. Upon the eleventh section I see no objection to the legality of this race. That section first recites the 13 *G.* 2. *c.* 19. Taking the whole together, it seems to relieve from penalties in

(*a*) Supposing a steeple-chase to be illegal, although the defendant would not be entitled to arrest the judgment, if the above intendment could be made, it would seem to follow that he would be entitled to a nonsuit or a verdict in his favour, upon evidence excluding such intendment.

(*b*) 7 *Bingh.* 405., 4 *M.* & *P.* 575.

respect to the race taking place elsewhere than at *Newmarket* or *Black Hambleton*. The act, being one which professes to take away penalties, should have a liberal construction. It is contended that the expression "place or places" ought to be understood with reference to places at which horse-races are usually held. Lord *Eldon* seems to have adopted that opinion in *Whaley* v. *Pajot*. That, however, was not a horse-race, — a race between two horses. A horse-race is, properly, where the speed of one horse is matched against the speed of another horse. Here, it appears to us on this record that the point to start from was the same — that the point to arrive at was the same. It was a horse-race, and not a mere wager. I think it may be fairly considered a horse-race within the 18 *G.* 2. *c.* 34. It was a trial of the strength and speed and vigour of the two horses. Upon the ground contended for, it might have been said that if it were part of the terms that each horse should take a leap before he started, the race would be illegal; yet so slight a variance would surely be immaterial.

ERSKINE J. The language of Lord *Eldon* in *Whaley* v. *Pajot* throws a great deal of difficulty into the case. My brother *Ludlow* contends that the 3 & 4 *Vict. c.* 5., by repealing the 13 *G.* 2. *c.* 19., has made all horse-racing illegal, or that, if any horse-race be still legal by force of the 18 *G.* 2. *c.* 34., this race does not come within the provisions of that statute. The object of the act of 3 & 4 *Vict. c.* 5. was, not to render horse-racing illegal, but to relieve parties who had laid themselves open to actions for penalties in consequence of some slight deviation from the regulations prescribed by the 13 *G.* 2. *c.* 19. The object of the late statute was rather to encourage horse-racing than to restrain it. It would therefore be a strange circumstance if we were obliged

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to hold that the effect of the act was to render all horse-racing illegal; and we should not come to such a conclusion unless it is clearly marked by the statute. The 3 & 4 *Vict. c. 5.*, however, while it repeals the clauses in the 13 *G.* 2. *c.* 19. which relates to horse-racing, leaves the 18 *G.* 2. *c.* 34. untouched. The question is, therefore, whether enough remains under the eleventh section of the 18 *G.* 2. *c.* 34. to legalise horse-racing. I do not agree with my brother *Ludlow* that the sole object of the legislature in that enactment was, to relieve parties from penalties incurred under the 13 *G.* 2. *c.* 19. Then it is said that it is obvious that the 13 *G.* 2. contemplates races upon regular race-courses only; but, whatever may be the construction to be put upon that statute, we must give some effect to the language of the 18 *G.* 2. *c.* 34., where it is said that it shall be lawful to run any match for a prize not less than 50*l.* "at any place or places whatsoever."

Ximenes v. *Jaques* was not a horse-race at all. It was no trial of speed between two horses. Here, there was a trial of speed between two horses. *Whaley* v. *Pajot* was more like a horse-race than *Ximenes* v. *Jaques;* but that case was not decided ultimately upon the point thrown out by Lord *Eldon.* It was, however, a mere wager to try the speed of two horses under skilful management against one, and not a race between two horses. It lies upon the defendant to shew that the contract which he has entered into is illegal.

MAULE J. I am also of opinion that the judgment ought not to be arrested. The acts of parliament which have been referred to must be considered with reference to the general rules applied to the construction of statutes; and, so considered, I think that this race is a legal race. The statutes which made horse-racing illegal were the 16 *Car.* 2. *c.* 7. and 9 *Ann. c.* 14. The

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18 G. 2. c. 19. s. 3. prohibited the starting of horses for races unless they carried certain proportionate weights, — a provision, however, which does not seem to apply to horses that are not five years old. Sect. 5. provided that no horses should be started for races at other places than at *Newmarket* and at *Black Hambleton*, or otherwise than for prizes of the value of 50*l.* or upwards, and imposed certain penalties upon the contravention of these regulations. The cases exempted from penalties by this fifth section have been considered as legalised as against the former statutes. The 18 G. 2. c. 34. says, in express terms, that it shall be lawful for any person to run any match, or to start and run for any plate &c. of the value of 50*l.* and upwards, and at any weights whatsoever, and at any place or places whatsoever, without incurring, or being liable to, the penalties in the act of 13 G. 2. relating to weights, and in the same manner as might have been done if that act had never been made. It appears to me that by these words it was intended to relieve parties, not only from the penalties imposed by the 13 G. 2. c. 19., but also from any illegality created by the former statutes. I think the eleventh section of the 18 G. 2. c. 34. is to be read thus: — "It shall be lawful for any person to run any match for 50*l.* or upwards, at any weights whatsoever, and at any place whatsoever, without incurring the penalties in the act of 13 G. 2. c. 19., and without incurring any other illegality, under any previous statute." If that be the true construction of this section, the repeal of the 13 G. 2. c. 19. will not have the effect of taking away the legality of any race which was legal before the passing of the repealing statute. Then the only question is, whether the eleventh section of the 18 G. 2. c. 34. extends to this case. As that statute is one which takes away penalties, it ought to be largely expounded. The object of the legislature throughout

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these enactments has been, to encourage the production of a strong and powerful breed of horses; and I think that this was a race calculated to further that object. The only doubt is raised by the language held by Lord *Eldon* C. J. in *Whaley* v. *Pajot*. The decision in that case merely goes to this, that a race of two horses against one is not a horse-race within the meaning of the statutes. Lord *Eldon* is reported to have said that "there seems to be much ground for arguing from the nature of the 16 *Car.* 2. and 9 *Ann.* that these acts ought to be construed strictly, in order to enforce the principle on which they are founded, namely, to prohibit all horse-racing, and that the 13 & 18 *G.* 2. are, from their nature, to be so construed as to encourage the breed of horses, *and to permit that species of horse-racing only called racing on the turf.*" Lord *Eldon* does not say to permit only "races on the turf," but "that species of racing." I see nothing, however, in the acts to require so narrow a construction; and I think it is not too much to say that the statutes extend to all races between two horses running at the same time from one point to another point. It cannot be doubted that such races were assumed to be legal when the statute of 3 & 4 *Vict. c.* 5. passed.

Rule discharged.

BAXTER *v.* GRAY and ABBOTT, Executors of MARY BOSTOCK deceased.

Jan. 17.

A surgeon forbore to send in his bill for medicines and attendance to a deceased patient in her lifetime, under the *expectation* of a legacy. On her death, finding she had left him nothing, he made a claim on her executors. Held, that he was entitled to recover, no proof having been given of any *understanding* between the parties that he was to be paid only by a legacy.

ASSUMPSIT for work and labour done for the testatrix, and upon an account stated with her.

Pleas: non assumpsit; and, secondly, payment by the testatrix in her lifetime. Replication, traversing such payment, and issue thereon.

At the trial, before *Tindal* C. J., at the *Westminster* sittings after last term, it appeared that the action was brought by the plaintiff, a surgeon and apothecary, to recover about 500*l.* from the defendants, as the executors of a Mrs. *Bostock*, (after giving credit for 33*l.* received on account), for medicines and attendance upon her for a period commencing in the year 1829 and ending in *January* 1840, about nine months previous to her death. The plaintiff had been on terms of great intimacy with Mrs. *Bostock*, visiting her daily, and occasionally rendering her surgical assistance. Having an expectation of a legacy, he had never sent in any bill in her lifetime; but, finding that she had not left him any thing by her will, he made the above claim upon the defendants.

The Lord Chief Justice told the jury that if the plaintiff had furnished the medicines, and had attended upon the deceased on an understanding that he was to be paid only by a legacy, he was not entitled to recover. The jury having found a verdict for the plaintiff, damages 217*l.*,

Shee Serjt. now moved for a new trial, on the ground of misdirection. He contended that if there was a distinct expectation of a legacy on the part of the plaintiff, — which clearly appeared upon the evidence, — there

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was nothing from which any implied assumpsit could be raised, and that the jury should have been so directed.

TINDAL C. J. If the evidence had shewn that the work and labour were done upon an *understanding* between the parties, that the plaintiff was to be remunerated by a legacy, that would have amounted to an agreement that he was to make no charge. But if the work and labour were performed under a *hope* of a legacy, I see no reason why the plaintiff should not, on such hope failing him, be, as it were, remitted to his legal right. The law on the subject was correctly laid down in *Osborn* v. *The Governors of Guy's Hospital* (*a*), where *Raymond* C. J. told the jury that they were to "consider how it was *understood* by the parties at the time of doing the business." Here, no proof was given of any understanding as to the way in which the plaintiff was to be remunerated. I disapprove strongly of the course pursued by the plaintiff in not sending in any bill (*b*); but it seems to me that the jury shewed a due regard for the testatrix's estate, in cutting down the amount of the plaintiff's claim; and, on the whole, I think that justice has been done.

COLTMAN J. There appears to me no ground for finding fault with the way in which this case was left to the jury, or with the conclusion to which they have come. It would be most unreasonable if the plaintiff was to have no remuneration for his services.

ERSKINE J. There was evidence to warrant the jury in coming to the conclusion that the plaintiff attended the deceased in his medical capacity upon the usual terms. It is true that it also appeared that he forbore

(*a*) 2 *Str.* 728. (*b*) *Vide post*, 773. (*a*).

to send in his bill, under an expectation of receiving a remuneration in the shape of a legacy. But unless an understanding could be proved that he was not to make any charge, I think he was entitled, on being disappointed in his expectation, to require payment for the services which he had rendered to the deceased.

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MAULE J. concurred.

Rule refused. (*a*)

WALTON *v.* BATEMAN and Others.

Jan. 21.

IN this action, which was for an infringement of the same patent which came before the court in *Walton* v. *Potter* (*b*), application had been made to *Coltman* J. at chambers for leave to plead — first, not guilty; secondly, that the invention was not a new invention, as to the public use and exercise thereof; thirdly, that the invention was not *a new manufacture* within the meaning of the statute 21 *Jac.* 1. *c.* 3.; fourthly, that the cards mentioned in the letters patent and specification were generally known previously to the granting of such letters patent, and that the alleged improvements were not an invention in respect of which the said letters patent could lawfully be granted; fifthly, that part of the cards so mentioned were generally known previously to the granting of such letters patent, and that the alleged improvements were not an invention in respect of which the said letters patent could lawfully be granted;

In an action for an infringement of a patent, a plea that the invention is not a new manufacture within the 21 *Jac.* 1. *c.* 3., involves the question, not only whether the alleged patent is new, but also whether it is a manufacture, within the meaning of the statute.

(*a*) By the law of *France* no medical (or spiritual) attendant can take a legacy exceeding a fair remuneration for the services he has rendered; *Code Civil*, No. 909.; either directly or indirectly. *Ib.* No. 911.

(*b*) *Antè*, p. 411.

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sixthly, that the plaintiff did not particularly describe the nature &c. of his alleged invention; seventhly, that the invention was useless for sheet cards and top cards.

The learned judge having refused to allow the fourth and fifth pleas,

Talfourd Serjt., on a former day of this term, obtained a rule nisi for leave to plead those pleas; against which

Bompas Serjt. now shewed cause, and contended that the pleas were unnecessary, being merely a repetition of the third plea.

Talfourd Serjt. in support of the rule. The defendants have no wish to retain the fourth and fifth pleas if the court are of opinion that the defence therein sought to be set up, is open to them under the third plea, namely, not only that the alleged invention is not new, but also that it is not a manufacture within the 21 *Jac.* 1. *c.* 3.

TINDAL C. J. There is no reasonable doubt as to that point. I think that, under the plea that the alleged invention is not a new manufacture, the question whether it is a manufacture within the statute is involved. (*a*) The rule must therefore be discharged.

The other judges concurring —

Rule discharged.

(*a*) *Vide antè*, 434, 435.

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RICHARD PERRY *v.* SARAH WATTS, Administratrix of JOSEPH WATTS deceased.

Jan. 18.

In covenant by the assignee of the reversion against the administratrix of the lessee, the declaration, in deducing the title to the plaintiff, set out a deed purporting to be attested by *two credible witnesses*, whereby one *J. P.*, in pursuance of a power, appointed the premises to the plaintiff. At the trial, it appeared that one of the attesting witnesses was the wife of the appointee; whereupon a verdict was entered for the defendant upon a plea which traversed the appointment.

COVENANT. The declaration, after stating that *William West* being seised in fee, by indenture of the 25th of *August* 1805, demised the premises in question to *J. Watts*, the intestate, for the term of forty-three years, and setting out a covenant to repair, alleged that *Watts* entered, and enjoyed the premises until his death, on the 1st of *June* 1828, after which all his estate and interest therein vested in the defendant as administratrix, and that she entered.

The declaration then traced the reversion from *West* through various parties, to *Campion*, and averred that *Campion*, by lease and release of the 8th and 9th *November* 1816, (the release being made between *Campion* and *Sophia* his wife of the first part, *John Perry* of the second part, and *Wilde* of the third part,) conveyed unto *Wilde* the said reversion of and in the said demised premises, "to have and to hold the same unto *Wilde* and his heirs, to such uses upon such trusts, and for such ends, intents, and purposes, and with, under, and subject to such powers, provisos, agreements and declarations as the said *John Perry* should, by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered

Quære, whether the declaration might be amended under the 3 & 4 *W.* 4. *c.* 42. *s.* 23., by stating the deed as operating either by way of grant or as a covenant to stand seised to uses.

The court at first inclined not to allow the amendment, except on payment of all the costs of the trial. After discussion, it was agreed that the defendants should repair the premises under a rule of court, and that no costs should be paid by either party.

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in the presence of, and to be attested by, *two or more credible witnesses*, from time to time direct, limit, and appoint; and in default of, and until such direction, limitation, or appointment, and so far as every or any such direction, limitation, or appointment should not extend, to the use of the said *John Perry* and his assigns during his natural life, without impeachment of waste; and after the determination of that estate, by forfeiture or otherwise, in his lifetime, to certain other uses in the said indenture more particularly mentioned." That, "after the making of the said last-mentioned indenture, to wit, on the 2d of *August* 1823, by a certain indenture then made between the said *John Perry* of the first part, the plaintiff of the second part, and *Wilde* of the third part, which said indenture was sealed and delivered by the said *John Perry* in the presence of, and was then attested by, *two credible witnesses*, [profert] it was witnessed that, in pursuance of a certain agreement in the said last-mentioned indenture recited, and for the considerations therein mentioned, the said *John Perry*, pursuant to, and by force and virtue, and in exercise and execution of, the power and authority to him the said *John Perry* reserved, limited, and given in and by the said indenture of the 9th of *November* 1816, did direct, limit, and appoint, that the said demised premises, with the appurtenances and the said reversion thereof, and all the estate of the said *John Perry* therein, should from thenceforth be and remain, to such uses, upon such trusts, and for such ends, intents, and purposes, and with, under, and subject to such powers, provisos, agreements, and declarations as the said *Richard Perry* [the plaintiff] should by any deed or deeds, writing or writings, with or without power of revocation, from time to time direct, limit, or appoint; and for default of, and until such direction, limitation, or appointment, and so far as every or any such direction, limitation, or appointment should not extend, to the use of the said

Richard Perry and his assigns during his natural life, without impeachment of waste; and after the determination of that estate, by forfeiture or otherwise, in his lifetime, to such uses as in the said indenture mentioned; whereupon and whereby the plaintiff then became and was, and from thence hitherto had been and still was, seised in his demesne, as of freehold, for the term of his natural life, of and in the said reversion of and in the demised premises with the appurtenances." The breaches assigned were: first, non-repair generally; secondly, non-repair after notice to repair within three months.

The defendant pleaded twelve pleas; the only plea material to the present question being the eighth plea, which alleged, that no such direction, limitation, or appointment, as in the declaration mentioned, was made by the said *John Perry*, in manner and form as therein alleged. Issue thereon.

At the trial before *Tindal* C. J., at the *London* sittings after *Hilary* term 1841, it appeared that one of the attesting witnesses to the appointment by *John Perry*, was the wife of the plaintiff, the appointee, whereupon it was objected that such appointment was not a proper exercise of the power created by the indentures of the 8th and 9th of *November* 1816, not having been executed in the presence of "*two credible witnesses.*" It was contended for the plaintiff, that the deed of the 2d of *August* 1823, though nugatory as an appointment, might still operate as a grant, so as to convey *John Perry*'s reversionary interest, and that the declaration might be amended in that particular.

A verdict was entered for the plaintiff upon the eleven other issues, and for the defendant upon the eighth, with liberty to the plaintiff to amend his declaration and enter a verdict for himself on the eighth issue also, if the court should be of opinion that the case was one in which an amendment could be made under the 3 & 4 *W.* 4. *c.* 42. *s.* 23.

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Bompas Serjt. having, in *Easter* term last, obtained a rule nisi accordingly,

Channell Serjt. now shewed cause. The first question is, whether the deed of the 2d of *August* 1823, which clearly was not a valid appointment, could operate by way of grant. It is not disputed that *John Perry* had, in addition to the power of appointment, an estate for life, and that such estate was a reversionary interest, being subject to the residue of the term of forty-three years, which might pass by grant. Neither is it denied, that where a party has a power coupled with an interest, he may by a deed, the primary intent of which is to operate as an exercise of the power, pass his interest, provided it contain apt words for that purpose. It will be found that, in Sir *Edward Clere*'s case (*a*), which is the leading authority on this subject, and in *Roe dem. Wilkinson* v. *Tranmer* (*b*), *Cox* v. *Chamberlain* (*c*), *Roach* v. *Wadham* (*d*), *Wynne* v. *Griffith* (*e*), and *Doe dem. Were* v. *Cole* (*g*), the deeds contained words of conveyance as well as of appointment. In this case, however, no words are used which shew any intention to pass an interest, the words employed being, "direct, limit, and appoint." The only case in which it seems to have been considered, that the words "limit and appoint" may operate as words of grant, is *Shove* v. *Pincke*. (*h*) But there it was not necessary to decide the point; and *Buller* J. seems rather to have looked upon the case, as a covenant to stand seised, for which there was a sufficient consideration, the defendant being the nephew of the covenantor. [*Coltman* J. Why might not this deed operate as a covenant to stand seised?

(*a*) 6 *Co. Rep.* 17. (*b*).
(*b*) 2 *Wils.* 75., *Roe dem. Wilkinson* v. *Tranmarr*, *Willes*, 682.
(*c*) 4 *Ves.* 631.
(*d*) 6 *East*, 289.
(*e*) 3 *Bingh.* 179., 10 *B. Moore*, 592., 5 *B. & C.* 923., 8 *D. & R.* 470.
(*g*) 7 *B. & C.* 243., 1 *M. & R.* 33.
(*h*) 5 *T. R.* 124.

There is both a money consideration, and a consideration by blood.] That might be so if there was any thing to indicate an intention that the deed should so operate, but it is apparent that the parties meant it to operate only as an appointment.

Secondly, suppose the deed operated by way of grant, how is the declaration to be amended? [*Tindal* C. J. As soon as it is established what the legal effect of the deed is, the deed may be pleaded according to such effect.] In *Shove* v. *Pincke*, the deed might have been pleaded either as a covenant to stand seised, or as a grant; which course is to be adopted here? It is clear that it would be necessary to alter the declaration in several important respects, and instead of pleading, it might be advisable for the defendant to demur. It is submitted that this is not a case in which the judge had power to amend, for the defendant would clearly be prejudiced by an amendment.

Bompas Serjt., in support of the rule. One question will be, whether the objection taken is open to the defendant under the eighth plea. The deed is not set out according to its legal effect. The plea does not put in issue its execution, generally, but merely denies its execution as an appointment. If the defendant meant to deny that it had any operation at all, she should have pleaded that it was not duly executed. [*Maule* J. There may be a question whether the plea is not bad as containing both matter of fact and law, denying both the fact of the execution and that it was an appointment; but the plaintiff has taken issue upon it. There is no direct statement in the declaration of any appointment; the plea must be taken to be a denial of that which amounted to an appointment.]

With regard to the main point, it is an established rule that a deed shall never be held to be void, if, by any construction, it can be held good; and a deed made

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for one purpose may enure to another if such effect be consistent with the intention of the parties. *Sheppard's Touchst.* 82. Per *Willes* C. J. in *Roe dem. Wilkinson* v. *Tranmarr.* (*a*) *Chester* v. *Willan.* (*b*) *Shove* v. *Pincke* is directly in point. That case shews that it is not necessary for the word "grant" to be used. Here, the deed may be treated either as a grant or a covenant to stand seised. [*Maule* J. On amending you would set out the deed, calling it neither a grant nor a covenant to stand seised, and leaving the defendants to demur if the deed did not pass any estate. (*c*) *Tindal* C. J. It seems to us that if the plaintiff is allowed to amend, he must pay the costs of the trial.] No instance can be found of a party, on an amendment being allowed, paying the costs of the trial. This is merely a technical objection, having nothing to do with the merits of the case. [*Maule* J. If you amend in the way suggested, the defendant would have a right to demur if she thought proper. *Erskine* J. By amending you would place the defendant in a very different position. *Tindal* C. J. She certainly has a right to see that the plaintiff is the proper party to bring the action. It may, however, be too much to make the plaintiff pay the costs of the issues which have been found in his favour.]

After a long discussion, it was agreed that the defendant should repair the premises under a rule of court, and that no costs should be paid by either party. (*d*)

Rule accordingly.

(*a*) *Willes*, 682., 2 *Wils.* 75. And see *Doe* v. *Salkeld*, *Willes*, 673.; *Haggerston* v. *Hanbury*, 5 *B.* & *C.* 101., 7 *D.* & *R.* 723.; *Doe* v. *Cole*, 7 *B.* & *C.* 243., 1 *M.* & *R.* 33.

(*b*) 2 *Wms. Saund.* 96 *a.*

(*c*) A general demurrer would lie if the deed passed *no* estate; and it would appear to be ground of special demurrer if the pleader, stating what was *said*, not what was *done*, omitted to shew *in what way* the deed operated. See *Com. Dig.* tit. *Pleader* (C 37.); 5 *Mann.* & *Ryl.* 451.; *ante*, Vol. I. 281. n.; *post*, Vol. IV. 4.

(*d*) See *Gurford* v. *Bayley*, the next case.

GURFORD *v.* BAYLEY. *Jan.* 24.

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff had, at the request of the defendant, employed him to lay out the sum of 942*l.* in the purchase of a government *annuity*, the defendant promised to lay out and invest the said sum of 942*l.* in the purchase of a government *annuity* for the term of the plaintiff's life. After stating the payment of the money to the defendant, the breach alleged was, that the defendant had invested the 942*l.*, not in the purchase of a government annuity, but in the purchase of an annuity in a certain society called The Royal Union Life Annuity Office; *per quod*, &c.

The defendant pleaded, among other pleas, first, non assumpsit; and, secondly, that he did not receive from the plaintiff the sum of money in the declaration mentioned for the purpose therein mentioned; concluding to the country. Upon these two pleas the replication joined issue.

At the trial, before *Coltman* J., at the first sittings in the present term, the plaintiff was unable to make out in evidence the contract stated in the declaration; but it appeared from a conversation which the plaintiff's attorney had had with the defendant, and from a letter of the latter, that he had received the money for the purpose of investing it in some government *security*. The learned judge, on the application of the plaintiff, allowed the declaration to be amended, by substituting the word "security" for "annuity," and the plaintiff had a verdict for 942*l.*, leave being reserved to the defendant to move to enter a nonsuit if the court should

Where the promise declared on was that the defendant should lay out a sum of money in the purchase of a government *annuity*, and the proof was that it was intrusted to him to be invested in a government *security*, the variance was held to be amendable by the judge at nisi prius, under the 3 & 4 *W.* 4. *c.* 42. *s.* 23.

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be of opinion that the judge had not power to make the amendment under the 3 & 4 *W.* 4. *c.* 42. *s.* 23.

Bompas Serjt. now moved to enter a nonsuit accordingly. He submitted that the amendment was one which the learned judge ought not to have made, The present is a much stronger case than *Perry* v. *Watts*. (*a*) [*Tindal* C. J. The defendant must have known whether he received the money for any purpose; and, on the amendment being made, he could prove his case by the same witnesses. How is his defence altered? *Erskine* J. What other pleas would he have to put on the record? and what other witnesses to produce?] He takes issue upon the point. [*Tindal* C. J. Is not this such a variance as is described in the act,—not going to the merits and not prejudicing the defendant in his defence? *Maule* J. The declaration alleges that the money was to be laid out on a *particular* government security; the evidence shewed that it was to be invested in *some* government security. But the ground of complaint is, that it was not laid out in *any* government security.] Although the amendment would not alter the pleas in terms, it would in effect; for the defendant would be made to say that which he did not intend. It is submitted that the amendment ought not to be made; but at any rate it ought not to be allowed except on payment of costs.

TINDAL C. J. The words of the statute must always be referred to when any question arises upon them. The twenty-third section, after reciting that "great expense was often incurred, and delay or failure of justice took place, at trials, by reason of variances, as to some particular or particulars, between the proof and the re-

(*a*) *Antè*, 775.

cord, or setting forth on the record or document on which the trial was had, of contracts, customs, prescriptions, names, and other matters or circumstances *not material to the merits of the case, and by the mis-statement of which the opposite party could not have been prejudiced,* and the same could not in any case be amended at the trial, except where the variance was between any matter in writing or in print produced in evidence and the record, and that it was expedient to allow such amendments as thereinafter mentioned to be made on the trial of the cause," enacts, "that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at nisi prius, if such court or judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such court or judge in any civil action, or in any information in the nature of a quo warranto, or proceedings on a mandamus when any variance shall appear between the proof and the recital, or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, presumption, name, or *other matter* in any particular or particulars in the judgment of such court or judge *not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence,* to be forthwith amended, by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another judge, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such court or judge, not material to the merits of the case, but such as that the

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opposite party *may* have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable." The question is, whether this amendment is in a matter material to the merits, and by which the defendant may have been prejudiced in the conduct of his defence; and I think that it is not. For whatever would be available to him as a defence under the declaration as it originally stood, would be equally so after the alteration was made. It seems to me that the amendment was properly allowed by the learned judge.

COLTMAN J. was at nisi prius.

ERSKINE J. I also think that the amendment was properly allowed. I cannot see how the defendant could be prejudiced by the alteration. According to the facts stated, the defendant, instead of investing the money in some government security, placed it in the hands of a private company; and any evidence he might have would be equally applicable to the declaration in the one form as the other. In *Perry* v. *Watts* the court thought that the defendant would in all probability have to plead different pleas than those on the record.

MAULE J. The amendment sought was of a simple nature, and one that could easily be made. If the declaration had stated that the plaintiff had employed the defendant to invest the money in a certain government security, *to wit*, a government annuity, no amendment would have been required. In *Perry* v. *Watts* the plaintiff sought to amend his declaration by setting out the deed at length, and by averring that a relationship existed

between the parties so as to raise a covenant to stand seised to uses. That was an amendment that could not, practically, be made at nisi prius. If the declaration had thereby been rendered good, the defendant might have put on the record different pleas from those before pleaded; but if not, then she might have demurred. That case was therefore much too complicated for an amendment at nisi prius, and was very different from the present.

Rule refused.

BELL, Public Officer of the National Provincial Bank of ENGLAND *v.* TUCKETT.

Jan. 14.

In assumpsit by a public officer of a banking company, the defendant pleaded that by an indenture made between the defendant of the first part, *A.* (therein described to be the manager of the copartnership) and *B.*, of the second part, and the persons whose names and seals were thereunto subscribed and affixed (creditors of the defendant), of the third part, the defendant assigned all his effects to *A.* and *B.*, in trust for his creditors; in consideration whereof the several creditors released their respective debts. The plea then alleged that "*A.*, so being such manager as aforesaid, *executed the said indenture as such manager as aforesaid* for and in behalf of the said copartnership, and duly authorised in that behalf, and which execution thereof by *A.* as such manager aforesaid hath been since duly ratified, confirmed, acknowledged, and acted upon by the copartnership, with the knowledge, assent, and concurrence of the several parties to the indenture." Replication, that *A.* did not execute the indenture as such manager for and on behalf of the copartnership, nor was he at any time authorised in that behalf in manner and form, &c.

ASSUMPSIT, by the plaintiff, as the public officer of a copartnership called "The National Provincial Bank of *England*," against the defendant as the acceptor of several bills of exchange. The declaration also contained counts for work and labour, for money paid, and for money found due on an account stated.

Held, on special demurrer, that the replication was good, inasmuch as the several allegations in the plea traversed by the replication constituted only one defence.

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The defendant pleaded, fifthly, that after the accrual of the several causes of action in the declaration mentioned, and before, &c., to wit, on the 6th of *April* 1838, by a certain indenture then made by and between the defendant of the first part, one *May* therein described to be the manager of The National and Provincial Bank of *England*, (being the said copartnership in the declaration mentioned,) and *William Burnell*, therein described to be one of the partners of the firm of Messrs. *Bryant* and company, who were also creditors of the defendant, of the second part; and the several persons whose names and seals were thereunto subscribed and affixed, being also respectively creditors of the defendant, of the third part; which said indenture, sealed with the seals of the several parties respectively of the first, second, and third parts, being in the custody, or under the control, or in the possession of some or one of them, adversely to the defendant, the defendant cannot produce the same to the court here (*a*); after reciting that the defendant was indebted to various persons in divers sums of money; and that for the purpose of providing a fund for the payment of his debts, he was desirous of assigning all his personal estate and effects whatsoever, upon the trusts thereinafter declared concerning the same, the defendant in consideration of the premises, and of, &c., with the privity, consent, and approbation of the parties thereto of the third part, testified, &c., bargained, sold, assigned, transferred, and set over unto the said *May* and *Burnell* all the goods, wares, and merchandize, stock in trade, &c.; and all and singular other personal estate and effects of, and belonging, due, and owing to the said defendant, and all the right, title, interest, &c. of the defendant, in, to, or out of the same: to have, hold, receive, &c., the said goods, &c., and all

(*a*) *Quære*, as to the sufficiency of this excuse of profert in point of certainty.

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other the premises thereby assigned, unto the said *May* and *Burnell*, their executors, &c., upon trust to sell the same. And the defendant did thereby irrevocably appoint the said *May* and *Burnell*, their executors, administrators, and assigns, to be the true and lawful attorneys for the defendant, to act, &c. After setting out the trusts of the moneys arising from the sales, and various covenants on the part of the defendant, the plea stated that, in consideration of the assignment so made by the defendant of the premises, the said several and respective creditors, who, by themselves, or by persons respectively authorised by them, had executed those presents for themselves respectively, and for their several and respective partner or partners, and each and every of them, acquitted, released, &c., the defendant, his executors, &c., of and from all accounts, reckonings, actions, suits, claims, and demands whatsoever which they, &c., could or might have against or upon the defendant, his heirs, &c., for or by means, or an account of all or any of the debts of them, or any of them, respectively due and owing from the defendant. Averment, that the said *May*, so being such manager as aforesaid, executed the said indenture as such manager of the said copartnership as aforesaid, for and on behalf of the said copartnership, and duly authorised in that behalf; and which execution thereof by the said *May*, as such manager as aforesaid, hath been since duly ratified, confirmed, and acted upon by the said copartnership, with the knowledge, assent, and concurrence of the said several respective parties to the said indenture. Verification.

Replication: that the said *May* did not execute the said deed as such manager for and on behalf of the said copartnership; nor was the said *May* at any time authorised in that behalf, modo et formâ; concluding to the country.

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Special demurrer, assigning for causes—that the only material issue which the plaintiff could or ought to have taken on the fifth plea was, upon the fact whether the said *May* had due authority from the said company mentioned in the declaration, to execute the deed set forth in the plea, if the execution of the said deed by the said *May* was, as a matter of fact, admitted; or if the plaintiff meant to dispute the execution of the deed by the said *May*, as a matter of fact, he should have put such execution in issue by a single traverse of that fact; but that the rules of pleading did not admit of *both* facts being traversed, in the mode in which the plaintiff had done by his replication; that in the form of traverse adopted in the replication, it was left in doubt whether the plaintiff meant to deny the execution of the deed by the said *May* as a matter of fact, or that he executed it in the character of manager, and was manager, and for and on behalf of the company; and that the replication was double, in this, that it put in issue not only the alleged authority to execute the said deed on behalf of the said company, but also the fact that the said *May* did execute such deed, on behalf of the said company, and not in his individual capacity; that if the plaintiff did not by his said replication assume to traverse, or did not sufficiently traverse, the execution of the said deed by the said *May* in his individual character as a matter of fact, it necessarily followed that it was admitted by the replication; that, in point of fact, he did execute the deed in his own individual capacity, and the only thing traversed was the authority from the company to him to execute the deed on their behalf; and then arose the further question of law, upon the admitted allegation in the plea that the execution of the deed by the said *May* had been since duly ratified, confirmed, and acted upon by the said copartnership, with the knowledge, assent, and concurrence of the parties respec-

tively to the said indenture, whether taking together the fact of the execution of the said deed by the said *May*, and such subsequent ratification and conformation by the said company of the said deed, it was not equivalent in law to a previous valid authority to the said *May* to execute the deed on behalf of the said company. Joinder.

Stephen Serjt., in support of the demurrer. First, the replication is double. The plea contains three distinct and material allegations, namely, that the deed was executed by *May*; that it was executed by him as manager on behalf of the company; and that he had authority from the company to execute it. The replication which takes issue on these three matters, the disproval of any one of which would have been sufficient to negative the plea, is clearly bad for duplicity. This differs from the common case of pleading a grant by deed, for there three points are involved in one allegation; but here the matters are several, in consequence of the particular form of the release. [*Tindal* C. J. Does not the act of parliament give the manager of a joint stock bank authority to do certain acts?] The plea does not rely on the statute. It alleges that *May* executed the indenture as manager, and duly authorised in that behalf. That must be taken to be a sufficient averment of authority, independently of the act. A strong case illustrating the rigour of the rule, and which is frequently cited, is given in *Brooke's Abr. tit. Double Plea*, pl. 90. (*a*): "Debt upon a bond, which was conditioned to stand to the award of *J. N.*, so that he made and delivered it to the parties before such a day. The defendant says that no award was made *or* delivered before the day, and this was held to be double *per totam curiam*; for it is a good plea to say that *J. N. made* no award before the day, and it is

(*a*) Citing 5 *H.* 7, 7. (*M.* 5 *H.* 7, fo. 7, pl. 14.)

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also a good plea to say he *delivered* no award before the day." [*Tindal* C. J. The making and the delivery of an award are distinct acts. The case of a deed is different; for it cannot be a deed without delivery.] So here, the allegation that *May* executed the deed is perfectly distinct from that which avers he was duly authorised in that behalf. It would seem in the case cited that the only material allegation was the delivery of the award; for it could not be delivered without being made. That, however, is not the view sanctioned by the rules of pleading, which appear to hold that it is no answer that one thing may be immaterial without the other. The case in *Brooke* was cited, and seems to have been recognised by this court, in *Griffin* v. *Yates*. (*a*) In *Smith* v. *Dixon* (*b*), to a declaration for not accepting certain trees which the plaintiff had sold to the defendant, and which averred that the plaintiff had taken up 6000 oak trees and tendered the same to the defendant, the latter pleaded that the plaintiff did not well and properly *take up for or tender or offer to deliver to* the defendant 6000 oak trees of the height &c.; it was held that the plea was bad for duplicity. Lord *Denman*, in delivering the judgment of the court, says, "The well and properly taking up the trees depends on the time and manner in which it was done, and is not necessarily coupled with any subsequent offer to deliver. If the plaintiff failed to prove the well and properly taking up, the defendant would be entitled to a verdict, though there had been an offer to deliver. On the other hand, if he failed to prove the offer to deliver, the same consequence would follow, though he should establish that the trees were well and properly taken up. Formerly the plea of non assumpsit would have put in issue both facts; but now all facts intended to be denied must be specially traversed, *yet not two by one*

(*a*) 2 *New Cases*, 579., 2 *Scott*, 845.

(*b*) 7 *A. & E.* 1., 2 *N. & P.* 1.

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traverse, as it is here." The present case clearly falls within that authority.

Secondly, the replication contains a negative pregnant. The defendant does not know whether the plaintiff means to deny that the company appointed *May* to execute the deed, or that he executed the deed as manager. The precise extent of the issue tendered is left doubtful; which, it is conceived, is the ground of objection to a negative pregnant. Illustrations of this doctrine are to be found in *Bac. Abr.* tit. *Pleas and Pleading*, (I.) 6. "In trespass for cutting his trees, the defendant pleads, that it was by command of the lessor, to give them to a stranger; the plaintiff replies that he did not cut the trees by his command; this was held a negative pregnant, and that he should have pleaded *ne commanda pas*." (*a*) "After issue joined, the defendant pleaded a release of the plaintiff, *puis darrein continuance;* the plaintiff replied that it is not his deed *puis darrein continuance;* this is a negative pregnant, because it implies the deed to be his, though not executed at the time alleged by the defendant." (*b*) "In case, against an host, for that the plaintiff's goods were embezzled by his default, he pleaded that they were not lost by his default; this is a negative pregnant, and he should have pleaded the special matter." (*c*) "In case for burning the plaintiff's house by the negligent keeping (*d*) of his fire, the defendant pleaded that the house was not burnt by the negligent keeping (*d*) of his fire: this is a negative pregnant." (*e*) In *Myn* v. *Cole* (*g*), to trespass for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter

(*a*) Citing 21 *H.* 6, fo. 46, 47. (*The Abbot of Torr* v. *Tonningham.*)

(*b*) Citing 21 *H.* 6, fo. 9. (*Davy's* case.)

(*c*) Citing 22 *H.* 6, fo. 38, 39. (*Bass's* case.)

(*d*) "*Pur defaut de bon gard*," in the original. At common law, actual *negligence* appears to have been immaterial. *Vide antè*, Vol. II. 746. (*c*).

(*e*) Citing 28 *H.* 6, fo. 7.

(*g*) *Cro. Jac.* 87.

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licensed him, &c., and that he entered by such licence. The plaintiff replied *quod non intravit per licentiam suam*, and issue was joined thereon, and found for the plaintiff. It was moved, in arrest of judgment, that he ought to have traversed the licence, and not the entry by the licence; for that is pregnant in itself, and an ill issue; and he ought to have traversed the entry (*a*) by itself, or the licence by itself, and not both together. *Williams* and *Yelverton* JJ. were of that opinion, and *Popham* J. agreed that the issue was ill, if it had been at common law, but being tried, it was made good by the 32 *H n.* 8. *c.* 30. *Lea* v. *Luthell* (*b*) is also in point. Here, the plea after alleging the execution of the deed by *May* as manager, and that he was duly authorised, proceeds to aver, "and which execution thereof by the said *May* as such manager as aforesaid, hath since been duly ratified, confirmed, acknowledged, and acted upon by the said co-partnership with the knowledge, assent, and concurrence of the said several parties respectively to the said indenture." This averment is not noticed in the replication, and must be taken to be admitted. If the company ratified the execution, it is immaterial whether *May* executed as manager, or with the authority of the company. [*Maule* J. The replication says, "nor was the said *May at any time* authorised in that behalf."] That is not sufficient; for it is clear that the plea makes the authority distinct from the ratification, and as there is no demurrer to the plea on the ground of duplicity, the plaintiff is bound to answer all its allegations, and the ratification having

(*a*) By this traverse the plaintiff would have denied his own cause of action. As the parties were agreed upon the fact of entry, — charged in the declaration and confessed by the plea, — it would perhaps have been no great stretch of ingenuity, in support of a judgment, to hold that the words of the replication must be understood as equivalent to *quod intravit absque licentiâ suâ*.

(*b*) *Cro. Jac.* 559.

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rendered the execution immaterial, the replication involves immaterial matter. There is a considerable analogy between this case and *Thurman* v. *Wild*. (*a*) It was there laid down, that where a defendant introduces an immaterial averment in his plea, the plaintiff cannot in his replication so traverse the matters of the plea as to include such immaterial averment in the issue. Therefore, where the defendant in trespass pleaded that the trespass was committed by command of *B.*, and then stated an executed accord between the plaintiff and *B.*, with the consent of the defendant, and acceptance thereof by the plaintiff in satisfaction of the trespasses, it was held that a replication traversing the accord and execution thereof *with the consent of the defendant*, was bad on special demurrer; for that as no rights of the defendant appeared to be compromised by the accord, his consent was unnecessary. Lord *Denman* says, "We are of opinion that the defendants in alleging their consent, made an immaterial averment. *Moore* v. *Boulcott* (*b*), however, is an authority with which we agree that this does not exonerate the plaintiff from the necessity of taking a material issue. There the action was for an attorney's bill; plea that it was brought for fees at law and in equity, and no bill delivered; the replication traversed that it was brought for fees at law *and* equity; and this was held ill; for the defence would have been good if the action were brought for either; and although the plea had unnecessarily alleged both, the replication was bound to take an issue, which, if sustained, would shew that the plaintiff had a good cause of action." One objection here is, that the plaintiff does not give the defendant the benefit of a material fact which the former does not appear to intend to deny, namely, that *May* did execute the deed.

(*a*) 11 *A. & E.* 453., 3 *P. & D.* 289.

(*b*) 1 *New Cases*, 323., 1 *Scott*, 122.

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Channell Serjt. (with whom was *J. Henderson*), *contrà*. (*a*) It is submitted that the replication is good. The plaintiff sues as one of the registered public officers of the bank, under the provisions of the ninth section of the 7 *G.* 4. *c.* 46. But that clause gives no power to the public officer to execute deeds, or to compound debts due to the company. The declaration is on several bills of exchange, the plaintiff being only the nominal plaintiff on the record. The plea is said to consist of three parts; first, that setting out the deed; then the part which is traversed in the replication; and lastly, the part to which it is said no reply has been made. The plea is in confession and avoidance. The contract stated is between the debtor and his creditors,

(*a*) On the part of the plaintiff, the following points were marked for argument: — That the replication was good; that it denied the execution of the deed by *May* as alleged: that the allegation that he executed as manager for and on behalf of the copartnership, and duly authorised in that behalf, was entire, and must so be traversed: that execution by *May* in his individual capacity, and not for the copartnership, would not affect the case, and therefore a traverse on the naked fact whether he executed the deed at all would be immeterial and too wide, and the denial properly and necessarily followed throughout the allegation that he executed as manager for, and duly authorised by, the copartnership: that if the statement of due authority were an integral part of the statement of the manner of the execution, then it was rightly involved in a traverse, *modo et formâ*; if understood as importing a new and distinct fact (such as — that whether *May* executed as manager &c., or not, he did execute in fact, and had the authority of the copartnership so to do for them, or that he had an express authority in addition to his powers as manager), then the duplicity, if any, was occasioned by the defendant's course of pleading, and, therefore, unobjectionable: that if the allegation of authority was immaterial (in addition to the previous allegation), then the traverse of it was immaterial, and immateriality was not stated as a special ground of demurrer; but, on the contrary, the demurrer alleged that the only traverse to be taken was on the authority: that if there was no execution for the copartnership, it was needless to deny the alleged ratification, as there could be no ratification of a nullity.

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and the trustees; there is no allegation of any contract entered into with *May* as manager. [*Maule* J. Do you object to the plea?] No. It is only sought to shew that every thing depends on the part that is traversed; namely, that "*May* so being manager as aforesaid, executed the said indenture as such manager as aforesaid for and on behalf of the said copartnership, and duly authorized in that behalf." Without that averment the plea is no answer to the declaration, and that being so, the plaintiff has a right to traverse the entire allegation. The effect of the plea is to set up a release by the bank; and the plaintiff says, that the bank did not release, adopting the language of the plea. The doctrine contended for by the defendant, though countenanced by some old cases, is not supported by the modern decisions. In *Robinson* v. *Rayley* (*a*) to a declaration in trespass, for, amongst other things, breaking and entering the plaintiff's free warren called *The Rabbit Walks*, the defendant pleaded a right of common in certain fields, whereof *The Rabbit Walks* were parcel; the replication traversed "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, *and* commonable cattle." Upon special demurrer, assigning for cause, that the replication was multifarious, and that several matters were put in issue, whereas only *one single matter* ought to be so, Lord *Mansfield* said, "It is true, you must take issue upon *a single point*, but it is not necessary that this single point should consist only of *a single fact*. Here the point is the cattle being entitled to common, this is the single point of defence. But, in fact, they must be both his own cattle, and also levant and couchant; which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite." And *Dennison* J. said, with reference to

(*a*) 1 *Burr.* 316.

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Crogate's case. (*a*) "But the rule in *Crogate's case* don't affect this case; for here the question is *one single proposition*, viz. the measure of the common, and the measure of the common is the levancy and couchancy jointly with the property." In *O'Brien* v. *Saxon* (*b*), where *Robinson* v. *Rayley* was cited, the court adopted the same view. There, to an action for maliciously suing out a commission of bankruptcy, the defendant pleaded that the plaintiff being a trader, and being indebted to the defendant in 100*l.* became bankrupt, wherefore the defendant sued out the commission. The plaintiff replied *de injuriâ;* and the court, on special demurrer, held that the three facts, the act of bankruptcy, the trading, and the petitioning creditor's debt consituted but one entire proposition, and consequently that the replication was good. So here, the several facts put in issue amount only to one proposition, namely, the release by the bank. In *Webb* v. *Weatherby* (*c*) in assumpsit by the assignee of an insolvent, the defendant pleaded payment of a certain sum in satisfaction and discharge. The plaintiff replied, that the defendant did not pay the insolvent the sum mentioned, in full satisfaction and discharge, nor did the insolvent accept and receive the same in satisfaction and discharge; and the replication was held good on special demurrer. That case appears to have been acted upon in *Bennison* v. *Thelwell.* (*d*) [*Maule* J. This replication is the same in effect as *de injuriâ.*] The reason why *de injuriâ* was not replied is, that the plea contains matter of discharge and not of excuse. In *Purchell* v. *Salter* (*e*) which was reversed in error in the Exchequer Chamber (*g*), but not

(*a*) 8 *Co. Rep.* 67.
(*b*) 2 *B. & C.* 908., 4 *D. & R.* 579.
(*c*) 1 *New Cases*, 502., 1 *Scott*, 477.
(*d*) 7 *M. & W.* 512., 9 *Dowl. P. C.* 739.
(*e*) 1 *Q. B. Rep.* 197.
(*g*) See *Ib.* 209.

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upon any point connected with the doctrine now under consideration, Lord *Denman*, after referring to the authorities, says, "The general conclusion to be drawn from them appears to be this, that the replication cannot be objected to as multifarious if the facts stated in the plea, though they are several, constitute one ground of defence; for the rule of pleading is, not that the issue shall be joined on a single fact, but on a single point of defence." In *Pigeon* v. *Osborne* (*a*) where in assumpsit for goods sold, the defendant pleaded that the goods were, with the knowledge and consent of the plaintiffs, sold to the defendants by one *H.*, being the agent of the plaintiffs, in his own name, as the true owner, and the plaintiff replied that the goods were not, with the knowledge and consent of the plaintiffs, sold to the defendant by *H.* in his own name, as the true owner, in manner and form &c. A demurrer to this replication, upon the ground that the traverse was a negative pregnant, and ambiguous, was held to be frivolous. Here, the defendant after contending that the traverse is too large, proceeds to contend that it is not large enough. He has no right to pray in aid that part of the plea which is put in issue; and if so, there is no pretence for saying that the part unanswered is any defence to the action. For it must be assumed for the purpose of this argument that *May* is a perfect stranger, and as such he executed the deed which was afterwards ratified by the bank. But if the execution is a nullity, the ratification must also be a nullity. Great stress has been laid upon *Smith* v. *Dixon*. In that case, however, there were two conditions precedent, and the plaintiff averred the performance of one, and his willingness to perform the other, and the defendant in his plea traversed both, which could not be done in

(*a*) 4 *P. & D.* 345., 9 *Dowl.* 511.

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one plea. Here, as the several matters alleged only constitute one defence, it would not have been sufficient to aver that *May* executed the deed; it was necessary to state that *May* was acting for the bank, and also that he was duly authorized by them. All that was decided in *Griffin* v. *Yates* was this, that *de injuriâ* may be replied in assumpsit (*a*), in answer to a plea containing matter of excuse. The cases cited from *Bacon's Abridgement* are clearly distinguishable from the present.

Stephen Serjt., in reply. It is agreed on both hands that the plea takes effect as a release. The defendant, however, does not rely on the plea as amounting to a general release; for, if so, the plaintiff might have replied that there was no release. It is said that the facts traversed by the replication constitute a simple defence; but that will give rise to a further difficulty with respect to the plea. The cases cited for the plaintiff turned on the plea being entire; which distinguishes them from this case. It is clear that in *Robinson* v. *Rayley*, the allegation that the cattle were commonable cattle levant and couchant constituted the single proposition that the cattle were entitled to common. So, in *O'Brien* v. *Saxon*, the trading the petitioning creditor's debt and the act of bankruptcy, only formed the allegation that the party had become bankrupt. So, in *Bennison* v. *Thelwell* the plea only amounted to an entire allegation of payment by an agent. And the same remark is applicable to *Purchell* v. *Salter*. It is said here that the single point is, the release by the bank. It is apprehended, however, that the bank could not have replied that they did not release; but that they must have pleaded *non est factum*, if any thing. Here, there is not a denial of its being the deed of the bank, but of its

(*a*) *Vide antè*, Vol. I. 720. (*b*); Vol. II. 736. (*a*).

being their deed under the peculiar circumstances mentioned in the plea. It is, moreover, not enough to shew that the matters in the plea amount to an entire proposition, there must be an entirety in the replication. It is a question of grammar; and there is no grammatical conjunction here as in *Pigeon* v. *Osborne*, so as to afford the plaintiff an opportunity of traversing the whole of the plea. In *Griffin* v. *Yates* a denial in the terms of the plea would have been bad, and the plaintiff was driven to reply *de injuriâ;* for the one substantial defence did not take the form of a connected proposition, which could be denied in a connected proposition. Here, the plaintiff is obliged to resort to a disjunctive allegation. The argument as to ratification was only used to shew more strongly that the plea contained a negative pregnant. The execution of the deed by the authority of the company is not admitted by the demurrer; for that admits only matters well pleaded. *Smith* v. *Dixon* bears a close analogy to the present case.

TINDAL C. J. Three objections have been made to the form of this replication; first, that it is double; secondly, that it amounts to a negative pregnant; and, thirdly, that it takes an immaterial issue by reason of its not embracing the only material fact in the plea.

With regard to the first point, I have always understood the rule to be, that a plea or replication is double where it contains two or more substantive answers; as, for instance, in assumpsit, a plea alleging a misnomer *and* a non-joinder of parties, would be a double plea in abatement. So, in an action for goods sold and delivered, a plea alleging payment *and also* a release would be bad for duplicity, as putting forward two several defences, each of which would be a complete answer to the action. But the question here is, whether

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the several allegations in the plea constitute more than one single ground of defence; for, if so, the plaintiff had a right by his replication to put the defendant to the proof of the whole. Now, unless the defendant makes out that the plea amounts to a release, it affords no answer. In order to shew that it does, he commences by setting out a deed of release executed by one *May*. That, of itself, clearly would be no answer to the action; he must therefore go further. He then takes another step, and says that *May*, (who is previously described to be manager of the company,) "so being such manager as aforesaid, executed the said indenture as such manager as aforesaid, for and on behalf of the said copartnership, and duly authorised in that behalf." That seems to me to involve the averment that, on the deed being referred to, it will appear to have been executed by *May* as manager for and on behalf of the copartnership. But that would not be enough. For what right had *May*, as manager, to release a debt of the copartnership? The plea therefore proceeds to state, "and which execution thereof by *May*, as such manager as aforesaid, hath been since duly ratified, confirmed, acknowledged, and acted upon by the copartnership," &c. The plea therefore virtually alleges two facts only, viz., that *May* executed the deed as manager for and on behalf of the copartnership, and that such execution had been ratified and confirmed by the copartnership. The replication states "that *May* did not execute the said deed as such manager for and on behalf of the said copartnership." That would not have been sufficient; for the substantial part of the plea is that part which alleges the subsequent ratification by the company of the act of the manager. Therefore the replication goes on to say, "nor was the said *May* at any time authorised in that behalf in manner and form as the defendant had in his said plea alleged;" properly treating the ratification as evidence or an acknowledg-

ment of a prior authority. By thus putting in issue the fact of the deed having been executed by *May* for and on behalf of the copartnership and by their authority, the plaintiff, in effect, puts in issue the subsequent ratification. I cannot distinguish this case from *Bennison* v. *Thelwell* (*a*), where, in assumpsit by the indorsee against the acceptor of a bill of exchange drawn by *D.* upon the defendant, the plea alleged that the defendant, by *D.* his agent, duly authorised in that behalf, paid to the plaintiff, and the plaintiff then accepted and received of *D.*, as such agent, a certain sum in full satisfaction and discharge of the causes of action. The replication that the defendant, by *D.* his agent, did not pay to the plaintiff, nor did the plaintiff accept or receive of *D.*, as such agent, the said sum in full satisfaction and discharge of the promises in the plea mentioned, was held good on special demurrer. That case brings the question to the well-known distinction between a replication putting in issue several allegations in the plea, either of which, *per se*, would be a good answer, and a replication taking issue on several allegations, which together amount only to one single defence. (*b*)

(*a*) 7 *M.* & *W.* 512., 9 *Dowl.* 739.

(*b*) *Quære*, whether, according to this distinction, a plaintiff might not put the whole of a plea in issue, without regard to the rule in *Crogate*'s case, whenever the plea could not be demurred to for duplicity. And *quære*, whether the rule of pleading may not be expressed thus: — A plea which contains two distinct defences may be specially demurred to. A plea which contains one defence, arising, out of several distinct propositions, may be replied to either generally or by taking issue upon one of those propositions only, — according to the distinctions laid down in *Crogate*'s case. Whether a plea consists of one proposition only, or contains several propositions constituting one defence, the plaintiff, in replying to the sole proposition or to one of the several propositions, may put in issue all the allegations necessary to make up that proposition. Thus, where, in a justification by the assignee of a term, the plea states, first, that the plaintiff demised to *A.*, secondly, that *A.*, being a trader, &c., became bankrupt, &c.; and, thirdly, that *B.*, the assignee of *A.* assigned to the

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of the deed by *May* had been since duly ratified and confirmed by the copartnership. It is obvious that, if that be so, the last allegation is superfluous; but when the plea is closely looked at, it does not appear to aver distinctly that *May* was authorised, but only that he executed the deed *as* a person duly authorised, and that afterwards such execution was ratified and confirmed. But then it is said that the replication is double, inasmuch as, instead of traversing one of those allegations, it has taken issue on both. Certainly, if it had not been for the recent cases of *Bennison* v. *Thelwell* and *Pigeon* v. *Osborne*, this replication would have appeared to have been open to that objection. The question is, whether this case does not fall within those decisions. What is the allegation in the plea? That the debt for which the action is brought has been released. The company sue the defendant in the name of the plaintiff; and he being a different officer from the one who is stated to have executed the deed, the defendant thought it advisable to set forth the release in the manner adopted. But that does not make the facts alleged amount to more than to the single proposition of a release: it appears to me that the replication is only a denial of that proposition. Then it is said to be uncertain whether it is meant by the replication to deny that *May* executed the deed, or that he executed it as manager duly authorised. But that objection, it seems to me, is disposed of by *Bennison* v. *Thelwell* and *Pigeon* v. *Osborne*; for the same argument might have been urged in those cases. Then it is said, as the plaintiff has not traversed the ratification by the company, it is admitted: but that is not so; for, by the traverse, the fact of the execution of the deed is denied; a mere statement of a ratification of such execution would not do. But, besides that, the averment of ratification merely amounts to an allegation that he executed by the authority of the copartnership, which is denied by

the replication. I think, therefore, that the replication is good.

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MAULE J. I also am of opinion that the plaintiff is entitled to judgment. The plea has been treated in the argument as if it contained an averment that the company authorised the plaintiff to execute the deed, as well as an allegation that the copartnership afterwards ratified and confirmed such execution. If that had been so, the plea would have been bad for duplicity. Where, however, a plea can be held good, it ought to be so construed; and here, when this plea is carefully read, it will be seen that it does not contain any allegation that *May* was authorised by the company to execute the deed. The words are "that *May*, so being such manager as aforesaid, executed the deed, as such manager as aforesaid, for and on behalf of the said copartnership, and duly authorised in that behalf," — not saying "*being* duly authorised," or that he was in any way authorised; — but merely meaning that *May* executed the deed as manager, and as duly authorised, — that is to say, assuming to act as manager, and to have authority to execute the deed. The plea then proceeds to state that the company ratified *May*'s execution of the deed; which is evidence of a prior authority, and is so treated by the plaintiff in his replication. There is certainly some nicety and difficulty, where several facts are pleaded, in saying whether they constitute more than one ground of defence. But it appears to me that it would be a very inconvenient rule to lay down, that this depends on the grammatical construction of the language used. I think that the question, whether this plea discloses only one ground of defence, which is properly put in issue by the replication, is a point to be decided on the substance, and not on the grammatical form of the pleadings. Now the substance of the plea is, that the company through *May* released the debt;

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and I think that, upon the authority of *Bennison* v. *Thelwell*, and more particularly on that of *Pigeon* v. *Osborne*, the replication in which was substantially the same as in the present case, the objection to this replication cannot be sustained. With respect to the objection, that the replication involves a negative pregnant, I do not think that the doctrine applies here, as soon as it is understood that the replication does put the defendant to the proof of all of the allegations in the plea. The cases cited upon this point are most of them open to the observation, that the party was by the plea required to admit or deny certain things which he was not at liberty to do in the informal mode of a negative pregnant. For instance, in the case mentioned in *Bacon's Abridgment*, of trespass for cutting trees, where, to a plea that the defendant cut them by command of the plaintiff, a replication that the defendant did not cut the trees by the plaintiff's command, was held bad. That was, I apprehend, on the ground that the plaintiff was called on by the plea to admit that the defendant cut the trees; and that it was an informal and improper way of saying that the defendant cut the trees without the command of the plaintiff. (*a*) So, in the action against the innkeeper, the reason why he was not allowed to plead that the plaintiff's goods were not lost by his default, was that, being bound to admit the loss of the goods, it was an informal mode of denying his negligence. These grounds do not apply to this case; for here all the allegations were matters which the plaintiff was not called upon to admit, but to deny. Though some of the decisions may not be satisfactory, yet, on the authority of the recent cases, I think that this replication is good.

Judgment for the plaintiff.

(*a*) *Vide antè*, 792. (*a*).

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WILKINS *v.* BOUTCHER and Another. *Jan.* 26.

TRESPASS, for breaking and entering a close of the plaintiff, called the *Tan-yard*.

The third plea, — after alleging that one *Cundall*, before, &c., to wit, on the 1st of *May* 1824, was seised in fee of the close in question, and being so seised by a certain indenture then made, demised it to one *Law*, from the 25th of *March* then last past, for the term of sixty-one years; and that *Law*, on the 13th of *September* 1825, by indenture, assigned the same close to one *Bucknell* for the residue of the said term, by virtue of which last-mentioned indenture *Bucknell* entered and became possessed, — proceeded —

And the said *Bucknell* being so possessed, the plaintiff claiming title to the said close, in which, &c., under colour of a certain charter of demise, pretended to be thereof made to him by the said *Cundall*, for the term of his natural life, before the making of the said demise by the said *Cundall* to the said *Law* as aforesaid, — whereas nothing of or in the said close, in which, &c., or any part thereof, ever passed by virtue of that charter, afterwards, — and before any of the said times, when, &c., and during the continuance of the said term, to wit, on the day and year in the first count mentioned, entered into and upon the said close, in which, &c.; and thereupon the defendants, as the servants of the said *Bucknell*, and by his command, at the same time when, &c., entered into and upon the said close in which, &c., and upon the plaintiff's possession thereof, and committed the

In trespass, *quare clausum fregit*, the defendants, after stating a demise by *A.*, the owner of the fee, for sixty-one years, and an assignment of the residue of the term to *B.*, and giving colour to the plaintiff, justified as the servants of *B.* Replication, that one of the defendants, as the agent of, and having lawful authority from, *B.*, by an agreement in writing, demised the close to the plaintiff for three years, who entered and became possessed; and that, during the continuance of that demise,

the defendants, of their own wrong, and in violation of the agreement, committed the trespasses. Rejoinder, that *B.* did not demise the close to the plaintiff, in manner and form, &c. Held good, on general demurrer.

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trespasses in the said first count mentioned in the said close in which, &c., as they lawfully might for the cause aforesaid, which were the alleged trespasses, &c. Verification.

Replication, that whilst the said *Bucknell* was so possessed of the said close, in which, &c., as in the said plea was alleged, and before, &c., to wit, on the 2d of *June* 1841, by a certain agreement in writing then made between the defendant *Boutcher*, as the agent of the said *Bucknell*, of the one part, and the plaintiff of the other part, the defendant *Boutcher*, having lawful authority from the said *Bucknell* in that behalf, did, as such agent, and in the name and for and on behalf of the said *Bucknell*, demise and let the said close in which, &c., unto the plaintiff, to hold the same to the plaintiff from a certain day then to come, to wit, from the 24th of the said month of *June*, for and during a certain term of years therein mentioned and specified, to wit, for and during the term of three years from thence next ensuing, at and under a certain yearly rent, to wit, the yearly rent of 200*l.*, to be paid and payable to the said *Bucknell* therefore; and that he, the plaintiff, then accepted the said demise, and under and by virtue thereof, afterwards and before, &c., to wit, on, &c., entered into the said close, in which, &c., and became and was possessed thereof, and continued so possessed, from thence until the defendants afterwards, and during the continuance of the said demise, to wit, at the said time when, &c., of their own wrong, and in fraud and violation of the said agreement, broke and entered the said close, and committed the said several trespasses, &c., in manner and form as the plaintiff hath above in that behalf complained against the defendants. Verification.

Rejoinder, that *Bucknell* did not demise or let the said close, in which &c., unto the plaintiff, in manner and form as the plaintiff hath above in his said repli-

cation to the said third plea alleged — concluding to the country.

General demurrer and joinder.

The points marked for argument in support of the demurrer were, that the rejoinder traversed what was not alleged by the replication, that is to say, that *Bucknell* demised; that it traversed not the facts alleged, but an inference and conclusion of law resulting from such facts; and that it involved a denial, which the defendants were estopped from making, namely, of the authority of the defendant *Boutcher* to demise.

Channell Serjt., in support of the demurrer. It was not competent to the defendant to traverse a fact not alleged in the replication; *Bedell* v. *Lull.* (*a*) The defendants having alleged a demise by *Bucknell*'s agent, the plaintiff has no right to say that *Bucknell* did not make the demise. [*Tindal* C. J. Is not a demise by his agent a demise by *Bucknell?* Suppose the defendants had chosen to plead a demise by him, and had proved a demise by his agent?] It must be admitted that there is a difficulty in supporting this objection on general demurrer. Another point is, that the traverse is too large; *Crosse* v. *Hunt.* (*b*) Also the defendant *Boutcher* is estopped from denying that he had authority to demise, the agreement representing that he had such authority. [*Tindal* C. J. He must be allowed in some mode or other to deny that he demised as agent.] If the defendant had said that *he* did not demise, the traverse might have been free from objection; but he states that *Bucknell* did not demise. [*Erskine* J. The rejoinder puts both the demise and *Boutcher*'s authority in issue.] That is objectionable. [*Erskine* J. Duplicity is not a ground of objection on general demurrer.] At any

(*a*) *Yelv.* 151. (*b*) *Carth.* 99.

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rate, the traverse is too large. [*Tindal* C. J. I do not see that it is, if the defendant *Boutcher* is to be at liberty to deny his authority.] The action is against him and not against *Bucknell;* and that, being so, he has no right, in this traverse, to deny his authority.

TINDAL C. J. Why cannot he deny his authority? Our judgment must be for the defendants.

The rest of the court concurred.

Judgment for the defendant.

Manning Serjt. was to have argued on the other side.

SISON *v.* KIDMAN.

Jan. 26.

Debt by the payee against one of the two makers of a joint and several promissory note. Plea, that the note was signed by the defendant at the request of *W.*, and for the security to the plaintiff of the sum of 15*l.* due from *W.* to him, and that the defendant never had any value or consideration for the note. Replication, that the defendant had value and consideration for the note. On demurrer to this replication: Held good, as the plea disclosed a sufficient consideration for the note so as to enable the plaintiff to maintain debt.

DEBT by the payee against one of two makers of a joint and several note for 15*l.*, payable on demand. The defendant pleaded that the note in the declaration mentioned was and is a promissory note made by the defendant and one *Watt;* but that neither before nor at the time of making the said note was the defendant liable to the plaintiff for the said sum of 15*l.*; and that the said note was made and signed by the defendant at the request of the said *Watt,* and for the security to the plaintiff of the said sum of 15*l.*, then due and owing from the said *Watt* to the plaintiff, of which the plaintiff then had notice; and that the defendant never had any value or consideration for the said note.

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Replication, that the defendant had value and consideration for the said note, to wit, of the amount of the said note.

General demurrer and joinder.

Stephen Serjt., in support of the demurrer. The question is, whether debt can be supported under the circumstances stated in the plea. [*Erskine* J. Has not the point been decided?] All the cases have arisen on demurrer to the declaration where the presumption was that there was a good consideration between the parties; but it has never been decided that debt will lie where the plea discloses that there is no consideration. [*Tindal* C. J. But this plea does disclose a consideration.] Not a consideration that will support debt. The defendant may be liable in assumpsit, but not in the present form of action; for the consideration here is nothing more than a collateral promise or undertaking. The declaration charges the defendant as the maker of the note; and, the action being by the payee, *primâ facie*, there is a privity between them which will support debt. The plea, however, shows that the defendant signed the note merely as a surety. The plea goes only to the consideration, and not to the effect of the note; for otherwise the defendant would be met by the argument that he could not alter his liability. This distinction is important. *Foster* v. *Jolly* (*a*), *Clarke* v. *Wilson* (*b*), and *Abbott* v. *Hendricks* (*c*), establish that, in an action by the payee against the maker of a promissory note, though the latter cannot vary the contract disclosed on the face of the note by parol, he may shew either that there was no consideration for the note, or that it has failed. [*Maule* J. What do you understand by the

(*a*) 5 *Tyrwh.* 209., 1 *C. M. & R.* 703.

(*b*) 3 *M. & W.* 208.

(*c*) *Antè* Vol. I. 791., 2 *Scott, N. R.* 183.

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word collateral?] When a sum is primarily owing from one person, and another party comes in only in aid of such person, debt will not lie. [*Maule* J. Suppose the consideration for the note had been something done for a third party, — would that make the note collateral?] No. [*Erskine* J. How is one of the makers more liable on the note than the other?] They are both equally liable; but the consideration is different. [*Maule* J. When a person becomes a party to a note, is he not subjected to all the liabilities which attach to it?] It may be admitted that it is not necessary to make any demand on the principal in order to render the surety liable; but that is consistent with the argument that the latter may shew the consideration of the note. The objection goes only to the consideration. The reason why debt will not lie between the indorsee and the acceptor of a bill of exchange is, that if you go to the original consideration the indorsee is not a party to it. In *Milton*'s case (*a*) the action was by the payee against the acceptor, upon a bill drawn by a third person. *Hale* C. B. observed upon the argument, "But the great question here is, whether or not a debt or duty be hereby raised; for if it be no more than a collateral engagement or promise, debt lies not." Ultimately the court held that debt did not lie; "for that the acceptance does not create a duty, no more than a promise made by a stranger to pay, &c. if the creditor will forbear his debt; and he that drew the bill continues debtor notwithstanding the acceptance, which makes the acceptor liable to pay it." (*b*) That decision was followed in *Browne* v. *London* (*c*) and in *Steward* v. *Hodges*. (*d*) [*Erskine* J. Here, the question is between the original parties to the contract.] So it was in *Milton*'s case, being between

(*a*) *Hardres*, 485.
(*b*) *Vide antè*, 177.
(*c*) 1 *Mod.* 285., 2 *Keb.* 695. 713. 758. 822.
(*d*) *Skinner*, 332. 346.

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the payee and the acceptor. [*Erskine* J. There the bill was drawn by a third person, and the payee might be considered one step further off.] The reason seems to be, that though in that case the payee may be a party to the contract, yet the consideration was between other parties; and the law appears to require that, in order to maintain debt, there must not only be privity of contract, but the consideration must be between the parties. *Randall* v. *Rigby* (*a*) is a strong authority on this point. There lands were enfeoffed to *H.* and the defendant, to the use, intent, and purpose that the plaintiff, his heirs and assigns, should receive out of the lands a yearly rent of 63*l.*, payable half-yearly; and the defendant covenanted with the plaintiff that *H.* and the defendant, their executors &c., some or one of them, would pay to the plaintiff, his heirs and assigns, the said yearly rent at the times appointed for payment thereof. It was held that the plaintiff could not sue the defendant in debt for the arrears of the annuity. [*Maule* J. The court there seemed to have treated the contract as a collateral contract. Is not this case more like *Evans* v. *Jones* (*b*), where it was held that debt lies upon an absolute contract by *A.* to pay on a certain day a certain sum due from *B.* on mortgage?] It is difficult to distinguish that case from *Randall* v. *Rigby*, except that the latter is the stronger case; for there the annuity was granted by the very deed which contained the consideration. *Parke* B. there says, "Upon this undertaking an action of covenant is the proper remedy, in which the plaintiff will recover by way of damages the amount actually in arrear. The case falls therefore within the principle of the authorities referred to in *Viner's Abr. Debt* (D), and ranges itself also with that of the lessor and lessee after assignment of the estate, as

(*a*) 4 *M.* & *W.* 130. (*b*) 5 *M.* & *W.* 295.

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decided in *Thursby* v. *Plant* (*a*) and in *Mills* v. *Auriol*. (*b*) Speaking of *Bishop* v. *Young* (*c*), where it was held that debt lies by the payee against the maker of a promissory note expressed for value received, *Bayley* J. says, in delivering the judgment in *Priddy* v. *Henbrey* (*d*), "What is the principle upon which that case was decided? Evidently this, that where there is a privity (independently of any security) between the parties, and the debtor undertakes not for another's debt, but for his own,—not to a stranger but to the creditor,—and he enters into a contract to pay that debt, specifying therein that he enters into it for that debt, an action of debt lies." [*Tindal* C. J. You do not bring forward any case where the party has entered into a new contract. A parallel case to the present would be, if the acceptor of a bill of exchange drawn by a third party, instead of paying, were to give the payee a promissory note for the amount.] Here, it is submitted that it is the same as a payee suing the acceptor.

Storks Serjt., *contrà*, was stopped by the court.

TINDAL C. J. When the defendant signed this note he entered into a new and original contract: he took the debt upon himself. It abundantly appears upon the plea that the note was made for a good consideration. I think that *Evans* v. *Jones* disposes of all argument upon the subject.

ERSKINE J. I also think that there is no doubt in this case. A good consideration for the note appears on the defendant's plea: then the case is that of a

(*a*) 1 *Sid.* 401., 1 *Wms. Saund.* 230 *b.*
(*b*) 1 *H. Bla.* 433.
(*c*) 2 *B. & P.* 78.
(*d*) 1 *B. & C.* 674., 3 *D. & R.* 165.

man who agrees to pay a certain sum on a good consideration. 1842.

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MAULE J. The case is wholly free from doubt.

Judgment for the plaintiff.

DOE dem. MARY ANNE PARKER *v.* JAMES THOMAS.

Jan. 28.

EJECTMENT. At the trial before *Gurney* B., at the last summer assizes for the county of *Sussex*, a verdict was found for the plaintiff, subject to the opinion of this court upon the following case:—

A copyhold is devised by *A.* to *B.* for life, remainder to *C.* in fee. *B.* is admitted and dies. *C.* has, before entry, a descendible estate; and upon the death of *C.* his customary heir, and not the customary heir of *A.*, is entitled to the copyhold.

The property in question is copyhold of inheritance, within, and parcel of, the manor of *Brighton*, descendible according to the custom of borough *English*, and devisable. The lessor of the plaintiff claims as customary heir of *Charles Parker*, her uncle.

Thomas Parker, the father of *Charles Parker*, and grandfather of the lessor of the plaintiff, died in 1801, seised in fee of this copyhold tenement, at the will of the lord, according to the custom of the manor, and intestate, leaving *Elizabeth*, his widow, and *Charles* and *George*, his sons, and *Mary*, his daughter, him surviving. Whereupon the property descended to *George Parker*, as the younger son and customary heir, subject to his mother's free bench. At a customary court of the manor, held in 1815, *Elizabeth* and *George Parker* were admitted, and surrendered the premises, for a valuable consideration, to *Charles Parker* in fee. *Charles Parker*, having been admitted, to hold in fee at the will of the lord, &c., surrendered to the use of his will, and

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died in 1817, unmarried and without issue. From his admittance to the time of his death, *Charles Parker* was seised, and in the receipt of the rents and profits.

In 1816, *Charles Parker* made and published his will, devising as follows:—

"I give, devise, and bequeath all my freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, unto my mother *Elizabeth Parker*, and my sister *Mary Parker*, subject to this condition, that the estate, right, or interest of my said sister shall not be subject to the contract or interference of any husband she may marry, or be liable to his debts or engagements. And I direct that my said sister's receipt or receipts, from time to time, for money expressed to be received shall be good and effectual discharge or discharges. And in case my said sister shall depart this life, either in the lifetime of my said mother or after her decease, leaving lawful issue, then from and immediately after the decease of the survivor of them my said mother and sister, I give, devise, and bequeath, my said freehold, copyhold, and leasehold estates unto, amongst, and equally between, &c.; and, if but one child, then to such one, his or her heirs, executors, administrators, and assigns, absolutely." Then followed several other limitations which never took effect, concluding with a limitation to "the person or persons, his, her, or their heirs, executors, administrators, and assigns, absolutely, who will by law be deemed, and is or are, my own right heirs."

The will of *Charles Parker* was duly executed to pass the property in question, pursuant to the said surrender to the use of his will, and according to the custom of the said manor. Upon the death of *Charles Parker*, *Elizabeth Parker* his mother, and *Mary Parker* his sister, entered upon the property in question, and into the receipt of the rents and profits thereof.

At a customary court of the said manor, duly held on

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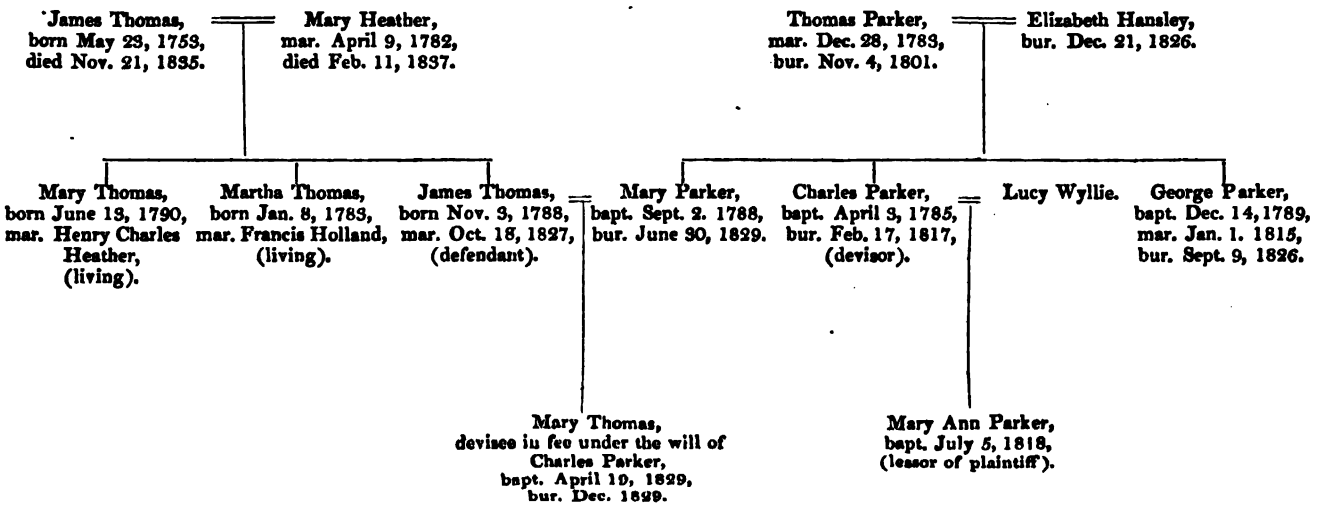
the 6th of *February* 1824, *Elizabeth Parker* and *Mary Parker* were duly admitted to the property in question, and from the time of such admittance, continued seised, and in the receipt of the rents and profits, thereof until the death of *Elizabeth Parker*, in *December* 1826. In 1827, *Mary Parker* intermarried with the defendant *James Thomas*. From the death of *Elizabeth Parker*, until the death of *Mary Parker* (then *Mary Thomas*), the said *Mary Parker*, received the rents and profits of the property. In *April* 1829, the said *Mary Thomas* had issue a daughter, *Mary Elizabeth Thomas*, her only child. In *June* 1829 *Mary Thomas* died, leaving her daughter *Mary Elizabeth Thomas* her surviving. Immediately upon the death of *Mary Thomas*, her husband *James Thomas*, the defendant, entered into possession of the premises in question, and has, from that time hitherto, received the rents and profits thereof.

In *December* 1829 *Mary Elizabeth Thomas* died an infant, leaving *Mary Heather*, formerly *Mary Thomas*, and *Martha Holland*, formerly *Martha Thomas*, her two paternal aunts, who are both now living, her co-heirs at law and her co-heirs by the custom of the manor of *Brighton*, they being the only sisters of the defendant *James Thomas* the father of the said infant *Mary Elizabeth Thomas*, and which *James Thomas*, the defendant, *Mary Heather*, and *Martha Holland*, were the three only children of *James Thomas*, the grandfather, and *Mary* his wife.

In 1826 *George Parker* died, leaving *Mary Anne Parker*, the lessor of the plaintiff, his only child, and his heir, according to the custom of the manor of *Brighton*, and also the heir, according to the custom of the same manor, of *Charles Parker*, of any copyhold estate within that manor, which did not pass by his will. (*a*)

(*a*) The will having been made before the 1 *Vict.* c. 26., the ultimate limitation would be inoperative.

PEDIGREE.


James Thomas, born May 23, 1753, died Nov. 21, 1835.
Mary Heather, mar. April 9, 1782, died Feb. 11, 1837.
Thomas Parker, mar. Dec. 28, 1783, bur. Nov. 4, 1801.
Elizabeth Hansley, bur. Dec. 21, 1826.
Mary Thomas, born June 13, 1790, mar. Henry Charles Heather, (living).
Martha Thomas, born Jan. 8, 1783, mar. Francis Holland, (living).
James Thomas, born Nov. 3, 1788, mar. Oct. 18, 1827, (defendant).
Mary Parker, bapt. Sept. 2. 1788, bur. June 30, 1829.
Charles Parker, bapt. April 3, 1785, bur. Feb. 17, 1817, (devisor).
Lucy Wyllie.
George Parker, bapt. Dec. 14, 1789, mar. Jan. 1. 1815, bur. Sept. 9, 1826.
Mary Thomas, devisee in fee under the will of Charles Parker, bapt. April 19, 1829, bur. Dec. 1829.
Mary Ann Parker, bapt. July 5, 1818, (lessor of plaintiff).

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The question for the opinion of the court is, whether the lessor of the plaintiff is entitled to the copyhold property in question, as the customary heir of *Charles Parker* her uncle. If the court shall be of opinion that she is so entitled, then the verdict for the plaintiff is to stand; but if the court shall be of opinion that the property in question did not descend to the lessor of the plaintiff as the customary heir of *Charles Parker*, then a verdict is to be entered for the defendant. (*a*) And it is agreed that this case shall, on the motion of either party, be turned into a special verdict; that the copy of the will of *Charles Parker*, hereunto annexed, shall be deemed part of the case, and that either party shall be at liberty to refer thereto; and that the pedigree, also hereunto annexed, shall be deemed to be part of the case, and a correct representation of the state of the respective families therein mentioned, at the time of the demise laid in the declaration and when this action was brought; and that the dates of the births, baptisms, deaths, burials, and marriages of the parties mentioned in such pedigree, shall be deemed and taken to be true and correct.

June 2.

Stephen Serjt. (with whom was *Petersdorff*) for the plaintiff. To make the estate descendible to the customary heir of *Mary Elizabeth Thomas*, an actual seisin in her was necessary. Though she took under the will as devisee in fee, yet, not having entered, she had only a freehold in law, not transmissible, like an actual freehold, to her heirs; *Co. Litt.* 11 *b.* 15 *a.* (*b*); *Ratcliffe's* case (*c*); 2 *Bla. Comm.* 208. The rule extends to copy-

(*a*) As *M. E. Thomas*, the infant devisee, died before the passing of the 3 & 4 *W.* 4. *c.* 106., her two aunts, *Mary Heather* and *Martha Holland*, and not her father, would be her heirs at law and her customary heirs; but if the lessor of the plaintiff had no right of possession, the defendant would be entitled to a verdict as against the plaintiff and his lessor, whoever might be entitled as heir of the infant devisee.

(*b*) 2 *Tho. Co. Litt.* 164.

(*c*) 3 *Co. Rep.* 41 *b.*

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holds, where it is the entry, and not the admittance, that vests a descendible estate; *Foxe* v. *Smith* (*a*); *Gilbert's Tenures*, 158.

A devisee has, until entry, merely a seisin in law; *Litt. s.* 167.; *Co. Litt.* 111. *a.*, 240. *b.*; *Hulm* v. *Heylock.* (*b*)

Channell Serjt. (with whom was *Peacock*), *contrà*. A party claiming as heir to a person who was seised *by descent*, must shew that his ancestor had actual seisin by entry; but if the ancestor took *by purchase*, no entry is necessary; *Watkins on Descents*, 28. (*c*) It will not be contended that a devisee takes otherwise than by purchase; and, therefore, a writ of *ex gravi querelâ* (*d*) lay for a devisee before entry, or for the heir of a devisee who had died without entry. (*e*) This principle applies to copyholds; *Doe dem. Winder* v. *Lawes*. (*g*)

Stephen Serjt. was heard in reply. (*h*)

Cur. adv. vult.

Tindal C. J. now delivered the judgment of the court. In this case the lessor of the plaintiff claims the premises in question as heir of *Charles Parker*, on the

(*a*) 1 *Freem. K. B. Rep.* 45.
(*b*) *Cro. Car.* 200.
(*c*) 4th ed.
(*d*) *F. N. B.* 198.
(*e*) *Ibid.* 199.
(*g*) 7 *A. & E.* 195., 2 *Nev. & Perr.* 195.
(*h*) The reply was upon a point on which no judgment was given. In the course of the argument it had been contended, on the part of the defendant, that, supposing an actual seisin to have been necessary, the entry of *James Thomas*, the father of the infant devisee, vested an actual seisin in the infant; for which were cited *Co. Litt.* 88, 89.; *Goodtitle* v. *Newman*, 3 *Wils.* 516.; *Doe* v. *Keen*, 7 *T. R.* 386.; *Watkins on Descents*, 56. (4th edit.). In answer to which, *Litt. s.* 123., *Co. Litt.* 240. 258. 273., 1 *Roll. Abr.* tit. *Disseisin* (I.) pl. 3. (translated 9 *Vin. Abr.* 105. pl. 3.), *Ibid.* tit. *Entail* (F.) pl. 1. (translated 9 *Vin. Abr.* 456. pl. 1.) were referred to. Nothing, however, was decided as to the effect of the entry by the father, that point becoming immaterial when it was held that actual seisin was unnecessary.

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ground that *Charles Parker* was the person last actually seised thereof, and the ancestor from whom, by law, the title by descent must be deduced. The defendant, on the other hand, contends that *Charles Parker* having by his will devised the premises in fee to *Mary Elizabeth Thomas*, the infant daughter of his sister, he, the defendant, is entitled to hold the premises as her heir (*a*), notwithstanding that she died before entry, and before obtaining any actual seisin.

The defendant indeed further contends, that if any actual seisin of a devisee is necessary for the purpose of transmitting the inheritance to his heir, in this case the entry of the infant's father, and the perception of the profits by him, as stated in the case, amounts in law to an actual seisin of the infant herself. But we hold it unnecessary to give an opinion upon this point, as we think the first position of the defendant is right, — that the devisee in fee has, without an actual entry, such a seisin of the premises devised as will enable his heir to take from him by descent, and consequently that the heir of the devisor in this case is not entitled to recover.

It is the clear result of all the authorities that wherever a party has succeeded to an inheritance *by descent*, he must obtain an actual seisin or possession, as contradistinguished from a seisin in law, in order to make himself the root or stock from which the future inheritance, by right of blood, must be derived; that is, in other words, in order to make the estate transmissible to his heirs. It will be quite sufficient to refer to the maxim in *Fleta*, "*Seisina facit stipitem*" (*b*), and to the

(*a*) *Vide suprà*, 819 (*a*).

(*b*) This is rather an inference. In the passage to which *Blackstone* refers, the words are, "Tunc (that is in default of issue and of brothers) fiat computatio a primo gradu immediatè, sicut a communi stipite, a patre scilicèt vel matre exeuntibus in seisinâ usque ad fratrem vel sororem in lineâ transversali; qui quidem, cum seisinam suam obtinuerunt, *stipitem faciunt et rectam lineam* discendendo quatenus ad suos hæredes." *Fleta*, lib. 6. cap. 3. § 2.

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well known doctrine of *possessio fratris* (*a*), without citing any express authorities upon this point.

But the case now under consideration does not arise upon the right of the heir claiming from an ancestor who himself took *by descent*, and died before actual seisin, but upon the right of one who claims as heir of a *devisee*, that is, of a *purchaser*, who dies before actual seisin; and the question is, whether the inheritance, under such circumstances, is to be claimed from such devisee as the person last seised, or from the devisor; and we are of opinion that the inheritance descends to the heir of the devisee.

The authorities relied upon on the part of the plaintiff appear to us by no means to support the proposition for which he contends; for, as to the passage in *Littleton*, s. 167., where, speaking of devises by custom, he lays it down "that he to whom the devise is made, after the death of the devisor, may enter into the tenements devised, to have and to hold to him after the form and effect of the devise, without any livery of seisin thereof to be made to him," &c., it cannot be said to intend, or even to imply, that there is any necessity for such entry in order to render the estate transmissible to the heirs of the devisee; nor is any such proposition there under consideration. It means no more than to point out the remedy *by entry*, which the devisee has in case the heir of the devisor keeps him out. And again, the reference to *Co. Lit.* 240. *b.*, where it is said that, "upon the decease of the devisor, the freehold in law is cast upon the devisee, and if the heir, before any entry made by the devisee, entereth and dieth seised, this descent shall not take away the entry of the devisee," carries the argument no further, as it does not touch the question relating to the *heir* of the devisee. As to the case of *Hulm* v. *Heylock*, which was relied upon on the part of the

(*a*) See 6 *Vin. Abr.* tit. *Copyhold*, 80. 192, 193., 7 *Vin. Abr.* tit. *Descent*, 584, 585. 589.

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plaintiff, it appears, on consideration, to be an authority in favour of the defendant. In that case a devise was made to an infant in fee, and after the death of the devisor his son and heir enters and levies a fine, with proclamations, in the lifetime of the infant, who afterwards dies, within age, the wife of the defendant *Heylock*, being his sister and heir; and the court held the fine and non-claim should bar the husband and all claiming under him, and the wife herself during the coverture; but the wife shall have new five years after the death of her husband. Now in that case there is no statement that the infant *entered* so as to make his sister his heir: on the contrary, the argument proceeds on the assumption that the infant never entered in fact; and, indeed, if such entry had been made, the freehold would have been in the infant, and the fine might have been avoided by the plea, *partes finis nihil habuerunt*. The inference, therefore, to be drawn from that case is, that entry in fact by a devisee is not necessary to enable the heir of such devisee to take by descent.

But more direct authorities in support of this position are not wanting. The language used by *Hale* C. J. in his *History of the Common Law*, ch. 11., seems to point at the very distinction now under consideration, between the taking by purchase and the taking by descent. "The last actual seisin," he says, "in any ancestor makes him, as it were, the root of the descent, equally, to many intents, as if he had been a purchaser." To which may be added the authority of the very learned treatise on the law of descents by the late Mr. *Watkins*; see *Watkins on Descents*, 4th ed., p. 28., with the references there made. And further, *Fitzherbert's Natura Brevium*, 199, 200., on the writ of *ex gravi querelâ*, affords the inference that such is the law. That writ, as it is well known, lay where a man devised lands or tenements in any city or borough, or in gavelkind, where such lands were devisable by will, time out of

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mind, in order to compel the execution of the devise. And we know from *Co. Litt.* 111 *a.*, "that after an actual possession this writ lieth not, for then the devisee may have his ordinary remedy by the common law." But *Fitzherbert* gives one instance of the writ where it is applicable, in place of a formedon in the descender, for tenements devised, upon the deforcement of the *heir* of the devisee, in which writ there is no statement of any entry, or seisin in fact, of the devisee; and that this difference in the statement of the title is not made without consideration, is manifest from the note which follows, viz. "And it seemeth, that when the tail is once executed by force of the devise in the tenant in tail, or in the tenant for term of life, that then he in the remainder, or heir of tenant in tail, may have a formedon in the descender by the course of the common law after (*a*) the statute of *Westminster* the 2d, according to the common form upon a gift made in tail by deed." (*b*) For a formedon in remainder does not lie without alleging esplees in the particular tenant; see the *Registrum Brevium*, 244, 245. It follows, therefore, from these authorities, that the heir of the devisee in tail may maintain a writ of *ex gravi querelâ*, without alleging any esplees to have been taken by the devisee; and as the remedy by entry, and that by the writ of *ex gravi querelâ*, are placed by Lord *Coke* on the same foundation, see *Co. Litt.* 111 *a.*, it seems to be law that a person may make himself heir to the devisee without alleging esplees in such devisee, or any actual seisin by him. The inheritance, therefore, in this case, must be claimed from the devisee as the person last seised, and consequently the heir of the devisor is not entitled to recover. We therefore direct the verdict to be entered for the defendant.

Judgment for the defendant.

(*a*) "Used after" (*use puis*). (*b*) *F. N. B.* 200 *B.*

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Goss and Another, Assignees of WILLIAMS, a Bankrupt, *v.* QUINTON.

Jan. 28.

TRESPASS, by *Edward Goss* and *Edward Charles Clarke*, assignees of *Francis Williams*, a bankrupt, against *Henry Chidgey Quinton*, for seizing, taking, and carrying away a certain ship and a certain rudder of the plaintiffs as assignees, of the value of 4000*l.*, and converting the same to the defendant's use.

Pleas: first, not guilty — secondly, that the plaintiffs were not assignees of the estate and effects of the said *F. Williams*, alleged in the declaration to be a bankrupt, *modo et formâ*; concluding to the country (*a*) — thirdly,

A. being examined before commissioners of bankrupt, admits having taken property which had belonged to the bankrupt. Upon cross-examination by his own attorney, he states that he purchased the property under an agreement, which he produces; a copy of which agreement is entered as part of his answer. Upon an issue of not guilty in trespass *de bonis asportatis* brought against *A.* by the assignees of *Francis Williams*, a bankrupt, the examination of *A.* is given in evidence on behalf of the plaintiffs, to prove the asportation. Held, that this was evidence to go to the jury of the existence of the agreement, without producing, or accounting for the absence of the original document.

A. orders a rudder to be made by *B.*, a shipbuilder, for *A.*'s ship. *B.* begins to make a rudder, which he states is intended for *A.* Before this intention is communicated to *A.*, and before the rudder is finished, *B.* becomes bankrupt. After the bankruptcy, *A.*, who is a creditor of *B.*, is informed that the rudder was intended for him, and takes it away. Held, that this acquiescence on the part of *A.* having relation to the prior intention of *B.*, was evidence to go to the jury of an appropriation of the rudder so as to negative the property of the assignees therein.

Held, that a stipulation in a contract for the purchase of a ship made with a shipbuilder, that a certificate shall be delivered to the purchaser by the builder, for the purpose of enabling the former to obtain a register as owner under the ship-registry act (3 & 4 *W.* 4. *c.* 55.), before the masts are on board, and before the ship is in a sufficiently forward state for the measurements required to be made by that act, does not render such contract illegal.

(*a*) *Quære* as to the materiality of the allegation here traversed. Describing the plaintiffs as assignees, appears to be the statement of a fact, which, before the new rules, the plaintiffs would not have been bound to prove under the general issue in trespass, trover, or in assumpsit.

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that before the time when &c., and before *Williams* became a bankrupt, to wit, on the 1st of *January* 1840, and from thence continually until and at the time when &c. in the declaration mentioned, the said ship and rudder were the proper ship and rudder of him the defendant; and before and at the time of the delivery to *John Doe* as thereinafter mentioned, the defendant was lawfully possessed of the said ship and rudder in the declaration mentioned, as of his own property; that before the said time when &c., and whilst he was so possessed of the said ship and rudder as aforesaid, to wit, on the 1st of *May* 1840, the defendant delivered the said ship and rudder to the said *John Doe*, to be kept by the said *John Doe* to and for the use of the defendant; and the said *John Doe* then received the same for the use of the defendant, and afterwards, and before the said time when &c., and after the said *Francis Williams* became bankrupt as aforesaid, to wit, on the day and year last aforesaid, the said *John Doe*, in violation of his said trust, wrongfully delivered the said ship and rudder to the plaintiffs, assignees as aforesaid, whereupon the defendant afterwards, to wit, at the said time when &c., seized, took, and carried away from and out of the said possession of the plaintiffs, assignees as aforesaid, the said ship and rudder, so being the said ship and rudder of the defendant, doing no unnecessary damage to the plaintiffs on that occasion, as he lawfully might do for the cause aforesaid, which were the supposed trespasses in the declaration mentioned, and whereof the plaintiffs had above complained against the defendant. Verification.

Issue was joined on the first two pleas. Replication to the third, that the said ship and rudder were not the proper ship and rudder of the defendant, *modo et formâ*; concluding to the country. Issue thereon.

At the trial before *Maule* J., at the first sittings at *Westminster*, in last *Easter* term, it appeared that the

vessel in question, a barque, called the *Brenda*, was built by the bankrupt under two agreements respectively, dated the 11th of *February* 1839, and the 11th of *March* 1840.

The first of these agreements was as follows (*a*): — "Memorandum of an agreement made this 11th day of *February* 1839, between *Francis Williams*, of the city of *Bristol*, ship-builder, of the one part, and Mr. *H. C. Quinton*, of the said city of *Bristol*, of the other part, that is to say, that the said *Francis Williams* proposes to build a vessel of the following dimensions, viz., length, ninety-six feet, breadth, twenty-five feet six inches, depth, seventeen feet six inches to eighteen feet, admeasurement about 270 to 280 tons, to be all of the best materials, and not to exceed 285 tons old measure. The hull to be of timber and plank, of size and thickness agreeable to *Lloyd*'s register-book for a ten years ship, and furnished with all shipwrights', joiners', and caulkers' work to the rails, in a workmanlike manner, including *rudder*, tiller, long figure-head, channel-work, windlass and poles, two housepikes, hatches, and all iron-work fastenings; for the hull, copper and iron, copper pintles, and braces and dove-tail plates, for the sum of 10*l.* 10*s.* per ton, old measure, with three boats. Timber to be found him, at the cheapest possible rate, by *H. C. Quinton;* six months' credit. The said vessel to be finished and launched by the 30th of *September* next. Payment, — 1000*l.*, in bills before the launching of the said vessel, and the remainder, on receiving builder's certificates, by bills at six and nine months."

In consequence of the *Brenda* not being completed at the time specified, the parties came to the following additional agreement.

(*a*) This agreement was not in evidence (*post*, 837.), but is given here to make the case more intelligible.

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"Memorandum. It is hereby agreed between us the undersigned, that upon the under-mentioned *Francis Williams* (as the builder of the barque *Brenda* of the port of *Bristol*, but now being on the stocks in the yard of the said *F. Williams*), delivering to the undersigned *H. C. Quinton* a builder's certificate of the said barque to enable him to procure a register as sole owner of the said barque *Brenda*, the said *H. C. Quinton* shall and will on return of the said builder's certificate, accept the said *F. Williams*'s draft, payable three months after date, for any balance which may be due and owing to the said *F. Williams* on the purchase of the said barque upon the agreement entered into by us, as under date of 11th of *February* 1839, after deducting thereout the amount of the several notes or bills of exchange now running, and which were paid to the said *H. C. Quinton* for timber purchased by the undersigned *F. Williams*. It is nevertheless understood and agreed that the said *F. Williams* is to finish and complete the said barque with all possible expedition, under the terms contained in the said agreement of the 11th of *February* 1839, and without prejudice to the said agreement, and the said vessel is to be launched at the risk and expense of the said *F. Williams*.

"Witness Signed *F. Williams*.

"*W. Bevan*. *H. C. Quinton*."

On the same day (the 11th of *March* 1840), *Williams* the bankrupt delivered to the defendants the usual builder's certificate, and on the 14th of *March* the defendant caused the barque (which had been previously launched) to be registered in his own name.

On the 23d of *April* 1840, *Williams* committed an act of bankruptcy, the barque being then unfinished, wanting masts, rudder, &c.; and a fiat issued against him on the 16th of *May*, under which he was duly declared a

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bankrupt, and the plaintiffs were appointed assignees. The barque was taken by the defendant from alongside the bankrupt's yard on the 15th of *August*, and the rudder in the beginning of *October*.

The plaintiffs in order to prove the actual taking away of the barque by the defendant, were compelled to put in the examination of the defendant taken before the commissioners under the fiat against *Williams*. Attached to and referred to in this examination, was a copy of the agreement of the 11th of *March* 1840; the existence of which agreement came out on the defendant's cross-examination by his own attorney, and on which the defendant relied as vesting in him the property in the barque, of which agreement there was no other proof.

On the part of the plaintiffs it was contended, that the mere statement by the defendant in that examination, that the agreement therein set out was entered into between himself and the bankrupt, did not dispense with the necessity of proving it in the ordinary way by calling the attesting witness. On the other hand it was insisted, that the agreement formed part of the examination, and that if any part of the examination were read, the whole of such examination must be considered as being in evidence. And of this opinion was the learned judge.

It further appeared that at the time the builder's certificate was given and the ship's register obtained, she was not finished; and it was thereupon insisted for the plaintiffs, that no property in her could pass, and the fifteenth and twenty-fifth sections of the statute 3 & 4 *W.* 4. *c.* 55. were referred to. (*a*) The cases of

(*a*) By the fifteenth section it is enacted, "That in order to enable the collector and controller of His Majesty's customs to grant a certificate truly and accurately describing every ship or vessel to be registered in pursuance of this act; and also to enable all other officers of His Majesty's customs, on due examination, to discover whether any such ship or vessel is

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Woods v. *Russell* (*a*) and *Clarke* v. *Spence* (*b*) were also cited. The learned judge overruled the objection, observing that he must assume that the officer whose duty it was to register the vessel, had properly performed it.

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the same with that for which a certificate is alleged to have been granted — that previously to the registering or granting of any certificate of registry as aforesaid, some one or more person or persons, appointed by the commissioners of His Majesty's customs (taking to his or their assistance, if he or they shall judge it necessary, one or more person or persons skilled in the building and admeasurement of ships), shall go on board every such ship or vessel as is to be registered, and shall strictly and accurately examine and admeasure every such ship or vessel, as to all and every particular contained in the form of the certificate hereinbefore directed, in the presence of the master, or of any other person who shall be appointed for that purpose, on the part of the owner or owners, or in his or their absence by the said master; and shall deliver a true and just account in writing of all such particulars of the built, description, and admeasurement of every such ship or vessel as are specified in the form of the certificate above recited, to the collector and controller authorized as aforesaid, to make such registry and grant such certificate of registry. And the said master, or other person attending on the part of the owner or owners, is hereby required to sign his name also to the certificate of such surveying or examining officer, in testimony of the truth thereof, provided such master or other person shall consent and agree to the several particulars set forth and described therein."

By the twenty-fifth section it is enacted, "That all persons who shall apply for a certificate of the registry of any ship or vessel shall, and they are hereby required to, produce to the person or persons authorized to grant such certificate, a true and full account, under the hand of the builder of such ship or vessel of the *proper denomination*, and of the time when, and the place where, such ship or vessel was built; and also an exact account of the tonnage of such ship or vessel, together with the name of the first purchaser or purchasers thereof (which account such builder is hereby directed and required to give under his hand on the same being demanded by such person or persons so applying for a certificate as aforesaid), and shall also make and subscribe a declaration before the person or persons hereinbefore authorized to grant such certificate, that the ship or vessel for which such certificate is required, is the same with that which is so described by the builder as aforesaid."

(*a*) 5 *B. & Ald.* 942., 1 *D. & R.* 587.

(*b*) 4 *Ad. & E.* 448., 6 *N. & M.* 399.

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With respect to the rudder it appeared that it was made for the *Brenda*, though not completely finished at the time of the bankruptcy so that it could have been attached to the ship; and it was insisted, on the part of the plaintiffs, that assuming the property in the barque to be in the defendant, the property in the rudder at all events had not passed to him.

The learned judge having summed up the evidence without adverting to the rudder, was reminded of the omission by the counsel for the plaintiffs; whereupon his lordship observed to the jury, that he always thought that the rudder *followed* the ship. The jury immediately returned a verdict for the defendant on the third issue, and for the plaintiffs on the first and second.

1841. *April* 24.

Bompas Serjt. having in *Easter* term last obtained a rule nisi for a new trial upon the ground of misdirection,

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Channell Serjt. (with whom was *Crowder*) now shewed cause. The defendant is not driven to rely entirely upon his own examination before the commissioners; for, independently of the agreement, (the terms of which were fully disclosed in such examination), the barque was *delivered* to him by *Williams*, the bankrupt, and possession taken, on the 11th of *March*. But the examination was properly received as evidence of the terms of the agreement. There is no doubt that the defendant himself could not have given it in evidence. It was however produced by the plaintiffs, with the view of proving, in support of the first issue, that the defendant took possession of the vessel; and they were not at liberty to read a part of that examination without reading the whole. [*Maule* J. The whole examination is the examination of the *commissioners*.] It is like the case of an answer to a bill of discovery,

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which, although not evidence for the defendant, becomes so on being produced by the plaintiff, who is not permitted to select any portion, but must make use of the whole or none. Here, as the plaintiffs thought proper to use the defendant's examination, they must take it with all its consequences; one of which was, that the agreement of the 11th of *March* 1840, was proved without the necessity of calling the attesting witness. It may be, that when the plaintiffs were about to use the examination, *they* might have been called upon to produce the original agreement; but after putting in the examination, they cannot object to the non-production of such original agreement. [*Erskine* J. Was any objection made at the trial that the original agreement was not produced and proved by the attesting witness? *Bompas* Serjt. Yes. *Maule* J. The examination was received in evidence at your instance, and the whole of it was read. Did you then object that the latter part should not be read? *Bompas* Serjt. Yes; but your lordship thought it was evidence. *Maule* J. It is clear that if any part of the examination is read, the whole must be read.] The claim set up at the trial was, not for the value of this barque, but for a right to a qualified possession, by way of lien, for a balance alleged to be due from the defendant to the bankrupt. No such claim, however, could be supported, when it appeared that the bankrupt had consented to possession being taken by the defendant from the 11th of *March*.

The right to the rudder follows the right to the ship to which that rudder belonged. The defendant says in his examination, "I demanded the rudder because it was on the bankrupt's premises, but I did not demand the ship, because it was in my own possession." It was the rudder belonging to the ship, because it was made for the ship; but it may have been doubtful whether before that demand the property was in the bankrupt or in the defendant.

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In trover a lien in the defendant may be given in evidence under a plea of not possessed (*a*); but this is not an action of trover but of trespass. The plea sets up property in the defendant, and gives colour. The replication traverses the allegation of property in the defendant. As the plaintiffs merely claim a lien and not an absolute property, in the barque *Brenda*, they should have replied the lien instead of traversing property in the defendant. Property in the defendant would have been consistent with the existence of a lien in the plaintiffs, which lien would have divested the defendant's right of *possession*, but would not have defeated his right of *property*.

With respect to the objection under the registry acts, it is submitted that it is immaterial, with reference to the provisions of those acts and the object of the laws requiring registration, whether at the time the certificate was granted, the vessel was complete or not; *Woods* v. *Russell*. (*b*) That case also shews that although the plaintiffs should have established a right of lien, the issue here taken upon the general right of *property* must be found for the defendant. In *Woods* v. *Russell*, *Littledale*, who was of counsel with the plaintiffs, endeavoured in vain to shew that the certificate of registry under the 26 *G.* 3. *c.* 60. *s.* 12. could not be given until the vessel was completed; and the provisions of the fifteenth section of the 3 & 4 *W.* 4. *c.* 55. (*c*) are similar to those contained in the former act. *Clarke* v. *Spence* (*d*), and

(*a*) *Vide Owen* v. *Knight*, 4 *New Cases*, 54., 5 *Scott*, 307., 6 *Dowl. P. C.* 244.; *Isaac* v. *Belcher*, 5 *M. & W.* 139., 7 *Dowl. P. C.* 516.; *Samuel* v. *Morris*, 6 *C. & P.* 620.; *Brandão* v. *Barnett*, *antè*, Vol. I. 908. Or it may be pleaded specially; *Luckhart* v. *Cooper*, 1 *New Cases*, 509., 3 *Dowl. P. C.* 415.; *Legge* v. *Evans*, 6 *M. & W.* 36., 8 *Dowl. P. C.* 177.

(*b*) 5 *B. & Ald.* 942., 1 *Dowl. & R.* 587., as to which case see the judgment of the court of King's Bench in *Clarke* v. *Spence*, 4 *A. & E.* 465., 6 *Nev. & Mann.* 415.

(*c*) *Antè*, 829. (*a*).

(*d*) 4 *A. & E.* 448., 6 *N. & M.* 399.

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Laidler v. *Burlinson* (*a*), also shew, that a ship, in progress of building, may be purchased, so as to vest the property in the vendee. In *Laidler* v. *Burlinson* two former cases (*b*) were relied on by the court.

Jan. 14.

Bompas Serjt. in support of the rule. It is submitted that no legal proof was given of the agreement of the 11th of *March* 1840. It may be admitted that if the plaintiffs had put a question to a witness with respect to the agreement, the answer, if unobjected to on the other side, would have been evidence; but this is a different case. Here, the agreement appears on the examination in answer to a question improperly put by the defendant's own attorney. The rule is, that no document executed in the presence of an attesting witness can be proved without calling that witness. *Remmie* v. *Hall* (*c*) was very similar to the present case. There, in an action on an agreement to execute articles of partnership, the plaintiff called a witness, who proved the breach of the agreement by the admission of the defendant, who, in the same conversation, stated, as his reason for refusing to perform the agreement, that the plaintiff was insolvent; and that he had delivered the partnership property (wine) in satisfaction of his separate debts. The defendant wished to rely upon the evidence so given by the plaintiff; but *Abbott* C. J., after argument by *Marryat*, ruled that although the defendant had assigned his reasons for breaking the agreement, at the same time he had made the admissions upon which the plaintiff relied, yet that it must not be taken that the reasons so assigned by the defendant were well founded; that the evidence went no further than that the defendant had so *declared*, but that if the defendant

(*a*) 2 *M.* & *W.* 602.

(*b*) *Longfort* v. *Tiler*, 1 *Salk.* 113., and *Mucklow* v. *Mangles*, 1 *Taunt.* 318. And see *Shepp. Touchst.* 224, 225.

(*c*) *Guildhall*, 16th *March* 1819. *Manning's N. P. Dig.* 376.

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meant to rely upon the facts so stated by him, as a defence, *he must prove the truth of such facts by evidence*, and was not entitled to have such facts taken as true, because he had stated them, although such statement had been made at the time of the admission upon which the plaintiff relied. With respect to the rudder, it was never out of the bankrupt's possession, and it could not pass by the certificate of registry. It was not finished when taken away in *October*, and no act of any kind was done appropriating it to the vessel. In *Mucklow* v. *Mangles* (*a*), it was held, that if a person contracts with another for a chattel, which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel until it is finished and delivered to him. It is there said by *Heath* J., "A tradesman often finishes goods which he is making in pursuance of an order given by one person and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods so sold. If the thing be in existence at the time of the order, the property of it passes by the contract, but not so where the subject is to be made." Though the rudder in this case was *intended* for the *Brenda*, it was not so appropriated that the builder might not have substituted another for it. So, in *Atkinson* v. *Bell* (*b*), it was held that, to support an action for goods bargained and sold, there must be either an actual sale of goods existing at the time of the contract, or a specific appropriation by the seller, of goods afterwards assented to by the buyer. *Laidler* v. *Burlinson* (*c*) is a strong

(*a*) 1 *Taunt.* 318.
(*b*) 8 *B. & C.* 277., 2 *M. & Ryl.* 292.
(*c*) 2 *M. & W.* 602.

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authority to shew, at any rate, that no property passed in the rudder. When did the property in the rudder pass? It is clear, that the defendant could not have objected if another rudder had been substituted; for there was no appropriation to the vessel of the rudder in question. *Woods* v. *Russell* and *Clark* v. *Spence* are clearly distinguishable. In the former case, the rudder and cordage were complete, and ready to be attached to the ship.

Manning Serjt. on the same side. The plea admits the conversion, and admits that the plaintiffs were in possession at the time of such conversion. The allegation of property in the defendant must therefore be understood to be of such a property in the vessel and in the rudder, as would justify taking them out of the possession of the plaintiffs; which could only be an absolute property, free from any lien which would justify the plaintiffs in withholding the possession from the defendant.

If the examination before the commissioners is held to be proof of the agreement of the 11th of *March* 1840, it can only be on a principle which will dispense with the necessity of giving evidence which it may be inconvenient to produce, in a variety of cases. [*Maule* J. Do you say that you should have been allowed to stop in the middle of the examination?] The defendant might be entitled to require any part of the examination to be read, which could in any way explain or justify that which had been read for the plaintiffs; but it ought not to have been read to the jury as evidence of a distinct and independent fact, which the defendant was bound to prove; and it evidently misled them. If the defendant wished to make use of any thing stated therein by himself, not by way of explanation of other parts of the same document, but as a substantive fact in the cause, he should have proved the fact *aliundè*; he could not avail himself

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of it in that form. [*Maule* J. Was not the reading of the whole examination ultimately acquiesced in?] No. The opposition ceased when it was found to be unavailing. [*Tindal* C. J. The real question is as to the effect of the examination.] Assuming that the defendant was entitled to have the whole examination read, the question still remains whether it was evidence for the defendant of the agreement. When there is an attesting witness, there is a tacit stipulation with the parties that the agreement shall be proved by him alone, subject to the usual exceptions of his being dead, &c. Another objection is, that supposing the examination to be proof of the agreement of the 11th of *March* 1840, still that agreement was imperfect, as it contains an express reference to the agreement of the 11th of *February* 1839, which was not in evidence in any shape whatever. It is apprehended, therefore, that the examination furnished no proof of the contract between the parties. To meet the objection that the defendant's answer was obtained by a question put by his own attorney, it has been said that the examination is to be considered as the examination of the commissioners. In the same manner an examination at nisi prius may be said to be the examination of the judge; but still a distinction is taken as to the party by whom a question is put. Another objection arises on the certificate of registry; for as the vessel was not finished when the certificate was given, no property could pass by it. The registry acts evidently contemplate only the registering of a perfect vessel. In this case when the certificate was given, and the registry obtained, the vessel had no masts; and it was impossible that the vessel should be accurately described at a period when it must be uncertain whether she would be finished as a barque or a ship. [*Tindal* C. J. Supposing the certificate to have been improperly given, how will that affect the rights of the parties to this action?] It is not

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contended that a ship may not be sold while building, but the selling of an unfinished vessel, with a clause in the agreement of purchase, by which the vendee stipulates, and the vendor engages, that there shall be such a certificate as this, is illegal. [*Tindal* C. J. How can the assignees be in a better position than the bankrupt?] It is submitted that such a contract is void by the statute, the provisions of which it contravenes.

With respect to the rudder it is to be observed that the defendant contends that the property in the ship vested in *March* 1840; but the rudder was not commenced until *April*. The question is, whether a taking possession of a ship passes the property in a rudder which is made afterwards. The rule as to passing of property in chattels is correctly laid down in the side note to *Atkinson* v. *Bell.* (*a*) Both of the ingredients there mentioned are wanting in this case. Here, there was neither a specific appropriation of the rudder to the ship, nor any assent on the part of the buyer. The transaction must be looked at as it stood at the time of the bankruptcy. Supposing the bankruptcy had not intervened, *Williams* might have sold this rudder and have made another for the ship, or he might have bought one ready made, which he thought would suit the vessel better. It is clear that in such case the defendant could not have complained of this rudder being sold to another person. It was contended at the trial, that though there may have been originally no binding appropriation of the rudder to the ship, yet the acquiescence of the defendant in the appropriation intended by the bankrupt, was sufficient to vest the property in this specific rudder in the defendant. It would be extraordinary, if by any act of the defendant *subsequent to the bankruptcy*, the property in the rudder which had vested in the assignees for want of a specific appropriation, might be taken out of them without their con-

(*a*) 2 *Man. & R.* 292.

currence, consent, or knowledge, by the mere acquiescence of the defendant in an intention of the bankrupt, never communicated to the defendant until the period had arrived when he found that unless he could get the rudder, he would have nothing to set against the money which he had advanced to the bankrupt.

Then it is said that the rudder *belonged* to the ship. This is an ingenious fallacy which rests upon the double signification of the term used. "To belong" may mean to stand in the relation of property to an owner; but the word is also used to denote almost any relation in which one thing may stand to another. In the former sense of the term it would be absurd as well as untrue to say, that the rudder *belonged* to the ship. Taken in the latter sense, the proposition is so vague as to amount to nothing. The statement that the rudder belonged to the ship, is true in a sense in which the proposition is wholly immaterial and irrelevant. Its materiality and relevancy depend upon its being understood in a sense in which such a proposition neither is nor can be true.

It is submitted that the rule should be made absolute, as regards both the ship and rudder, or, at all events, with respect to the latter; the declaration stating, and the jury having found, the conversion both of a ship *and* of a rudder. As to the rudder, the verdict is not only against evidence, but it is clearly attributable to the observation made by the learned judge to the jury, by which, in effect, he directed them to leave out of their consideration the dates and other circumstances which shewed that, even supposing that the defendant had acquired an interest in the hull of the *Brenda*, he had nothing to do with the rudder until the tortious act for which this action was brought. [*Tindal* C. J. If the court should make any distinction between the ship and the rudder, it would not be worth while to send the case to a new trial.]

Cur. adv. vult.

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TINDAL C. J. now delivered the judgment of the court.

In this case it is objected on the part of the plaintiffs, in the first place, that there was no evidence to go to the jury, of the agreement in writing made on the 11th of *March*. But as that agreement is stated, in terms, in the examination of the defendant taken before the commissioners of bankrupt, which examination was put in by the plaintiffs themselves and formed part of their evidence, and was,—according to the report of the learned judge,—read without objection at the trial, there can be no question as to the admissibility of the examination; and if the plaintiffs had, at the time of the trial, sought to have a part only of the examination read, omitting that part which states the agreement, they ought to have been put, and undoubtedly would have been put, to their election, to read the whole or none, the examination being an entire thing. The question therefore is, not whether the examination is *the best* evidence, but whether it is *any* evidence of the agreement. And upon this question we think there can be no doubt; for, supposing the plaintiffs had accounted for the non-production of the original, and of the subscribing witness, or the defendant had (as in substance and effect he appears to have done), dispensed with the production and proof of the original, the examination would certainly have been secondary evidence, and therefore *some evidence* of the agreement. And it makes no difference, as to the point now under consideration, that the existence of the agreement became afterwards in the course and progress of the cause, a fact from which some inference favourable to the defendant, might be drawn.

It was in the second place objected that there was no evidence to go to the jury, that the rudder belonged to the defendant at the time he ultimately took it away. That the rudder was *intended* for the ship, although not

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completely finished so as to be attached to and form part of the ship at the time the latter was taken away, there is no doubt upon the evidence. If, therefore, the bankrupt, the shipbuilder, was constructing it *for* the ship, intending it to form part of the ship when completed, and if the defendant the purchaser considered and treated it as the rudder of the ship (*a*), we think it cannot be said there was no evidence to go to the jury, that the rudder was part of the ship, and that the question of right of property in it would be governed by the same legal considerations as would apply to the body of the ship. It was indeed conceded that if the rudder has been appropriated to the ship by the bankrupt with the consent of the defendant, the property passed to him (there being in this case no question of reputed ownership); and we think there was evidence for the jury on that point; and, without doubt, if, upon the facts proved at the trial, this question as to the rudder had been altogether withheld from the jury, on the ground that there was no evidence for them, it would, as appears to us, have been considered a misdirection. And although the evidence of appropriation is but slight, yet in a case where the substantial question in the cause had been decided in favour of the defendant, the jury would naturally, and not unreasonably, be satisfied with a slighter degree of evidence on a minor point like the one in question.

The objection raised as to the sale being made before the certificate of registry was granted was answered by the court in the course of the argument.

We, therefore, think the rule for a new trial should be discharged.

Rule discharged.

(*a*) It was his interest so to consider and so to treat it *after* the bankruptcy; before the bankruptcy he appears to have been ignorant of the intended appropriation. *Vide ante*, 831.

1842.

Jan. 28.

CLUTTERBUCK *v.* COFFIN.

The plaintiff agreed to enter as captain's cook on board of a brig of war, upon an undertaking by the defendant, the commander of the vessel, to pay him wages (12*l.* per annum) beyond the government pay, to which he would be entitled on his rating as an able seaman. Held, that there was a sufficient consideration for the agreement, to entitle the plaintiff, on the services being performed, to maintain an action against the defendant for such wages.

Semble, that such an agreement, the services under it having been performed, need not be specially declared on.

Semble, per Tindal C. J. and *Maule* J., that such an agreement is not illegal.

ASSUMPSIT, for work and labour, and on an account stated.

Pleas: non assumpsit; and, secondly, payment; on which latter plea issue was taken.

At the trial before *Maule* J., at the *Exeter* summer assizes in 1841, it appeared that in *December* 1837, the plaintiff, who was at that time captain's cook on board a steam-boat called the *Liverpool*, which was on her passage to *Malta*, was engaged, while at *Cadiz*, by the defendant, the commander of Her Majesty's brig *Trinculo*, to serve in the same capacity on board of the latter vessel, at the wages of 12*l.* a year beyond the rating of an able seaman. The plaintiff on entering the *Trinculo* was rated on the ship's books as an able seaman, but was entered as captain's cook, which had the effect of relieving him from doing duty as a sailor. According to the usual practice in such vessels, the plaintiff cooked not only for the captain but also for the gun-room. It further appeared that the plaintiff having in *August* 1838, displeased the defendant in preparing some fish for dinner; the latter ordered him to be flogged, and he accordingly received three dozen lashes. On the vessel being paid off in *May* 1841, the defendant refused to pay him any part of the wages he had agreed to give him, which had accrued due subsequently to his punishment.

It was contended, on the part of the defendant, that the action could not be maintained, inasmuch as the contract alleged was void, being contrary to public

policy; *Elsworth* v. *Woolmore* (*a*), and *Carter* v. *Hall.* (*b*)

The learned judge held that these cases were very distinguishable from the present, but reserved the point. The jury having found a verdict for the plaintiff, damages 34*l.*,

Sir *T. Wilde* Serjt., in last *Michaelmas* term moved to enter a nonsuit. He contended that the defendant's promise was without consideration; for the plaintiff having been entered on the ship's books as captain's cook, was bound to act in that capacity without being paid any extra wages; and also that the contract was against public policy. He cited *Harris* v. *Watson* (*c*); *Carter* v. *Hall* (*b*); *Elsworth* v. *Woolmore* (*a*); *White* v. *Wilson* (*d*); and *Thompson* v. *Havelock.* (*e*) A rule nisi having been granted,

Bompas Serjt. (with whom was *Greenwood*) now shewed cause. Most of the cases cited when this rule was moved for, are distinguishable from the present. *Harris* v. *Watson* was decided by Lord *Kenyon* on a principle of policy—that sailors shall not be allowed, at the time of danger, to extort from their captain a promise of an extra sum for extraordinary exertions. In *Stilk* v. *Myrick* (*g*) Lord *Ellenborough*, while agreeing that *Harris* v. *Watson* was rightly decided, doubted the ground of public policy on which Lord *Kenyon* is stated to have proceeded, and put it on the better ground, that the agreement was void for want of consideration. Here, however, the contract was made with the plaintiff before he entered the vessel, and at a time when he was per-

(*a*) 5 *Esp. N. P. C.* 84.
(*b*) 2 *Stark. N. P. C.* 361.
(*c*) *Peake, N. P. C.* 72., 2d ed. 102.
(*d*) 2 *B. & P.* 116.
(*e*) 1 *Campb.* 527.
(*g*) 2 *Campb.* 317., 6 *Esp. N. P. C.* 129.

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fectly free to contract. *Elsworth* v. *Woolmore*, and *White* v. *Wilson* turned entirely on the ship's articles signed by seamen employed in the merchant service pursuant to the statute of the 2 *G.* 2. *c.* 36. And in *Thompson* v. *Havelock* the question was, whether the captain of a merchant vessel, who was bound to give all his services to his owner, and who had engaged the vessel in the employment of the government, could recover a private remuneration which he had stipulated to receive. *Carter* v. *Hall*, where it was held that a purser's steward on board one of His Majesty's ships, could not recover wages from the purser upon an *implied* contract for his services as such on board the ship, more nearly approaches to the present case; and it is to be inferred, from Lord *Ellenborough*'s language, that he would have held the plaintiff entitled to recover had there been specific contract. Here, the plaintiff was engaged under a special contract to perform services for the captain in addition to doing his duty as a seaman. There was clearly a good consideration for the defendant's promise; and it is not easy to discover the grounds on which such an agreement can be said to be opposed to public policy, or to be illegal. No objection, however, on the score of illegality, can be raised in this case; for to make such an objection available it must, according to the rule of *Hilary* Term 4 *Will.*, 4 *Assumpsit* s., be specially pleaded. *Potts* v. *Sparrow* (*a*); *Martin* v. *Smith.* (*b*)

Channell Serjt. (with whom was *Taprell*) in support of the rule. Supposing there had been no contract at all under which the defendant could be held liable, still the plaintiff would have acted as captain's cook.

(*a*) 1 *New Cases*, 594., 1 *Scott*, 578.

(*b*) 4 *New Cases*, 486., 6 *Scott*, 261.

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[*Maule* J. If there had been no contract he would not have entered into the service.] It may be conceded that the defendant cannot avail himself of any presumed illegality in the contract, as there is no such defence on the record. It will be contended, however, that supposing the contract to be good in other respects, it has not been properly declared upon in the present action. The plaintiff's case is, that the defendant promised to pay him something extra out of his own pocket, beyond that which he would receive in respect of his being entered on the ship's books as captain's cook. The consideration alleged in the declaration, and put in issue by non assumpsit, has not been proved. It is submitted, that no services were rendered to the defendant; for all the plaintiff did he performed as the servant of the crown; and if there had been no contract he would still have received his wages. In *Harris* v. *Watson* the extra-work, as here, was done at the request of the defendant. That case shews, therefore, that it is not sufficient that the extra-work should be done at the instance of the defendant, in order to raise an implied assumpsit. [*Maule* J. The distinction is, that there, the plaintiff, at the time of the request, was bound to render the service; but here he was not.] Here, the plaintiff was bound, as captain's cook, to do all he did. [*Maule* J. Not at the time of the request. Do you say that no individual contract can be maintained in this case, or that the contract is misdescribed?] It is contended that no services were rendered by the plaintiff entitling him to recover anything from the defendant; but if the latter be liable, he is not liable in the present form of action. [*Maule* J. If any objection had been taken at the trial to the declaration, I should have allowed it to be amended. Either you should be excluded from this point altogether, or the court ought to have power to amend.] *Harris* v. *Watson* and

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Carter v. *Hall*, shew that the plaintiff is not entitled to recover; and it is submitted, that the fact relied on as distinguishing the present from those cases, namely, that here the plaintiff was a free agent at the time that the contract was entered into, makes no essential difference. It was held in *Dafter* v. *Cresswell* (*a*), that a man rated on board an *East India* ship as a seaman, and who signs the ship's articles, and receives pay as such, is within the statute 2 *G.* 2. *c.* 36., and cannot maintain an action for wages as cuddy-servant during the voyage. Here, the entering into the contract with the admiralty by being rated on the books of a Queen's ship, is equivalent to signing articles. In *Willis* v. *Peckham* (*b*), a witness attending a trial under a subpœna was held not entitled to compensation for his loss of time, although the party who required his attendance had expressly promised to pay him for such loss; and the same principle was established in *Collins* v. *Godefroy*. (*c*) At any rate it is clear that the defendant cannot be held liable under this form of declaration. [*Tindal* C. J. As that point was not taken at the trial it cannot be raised now.]

TINDAL C. J. When the objection on the score of illegality is abandoned, — and I do not see how it could be supported under the circumstances of this case, — the contract must be looked at as a legal contract, and then the only question is, whether it was made upon a sufficient consideration. At the time that the contract was entered into, the plaintiff was not in Her Majesty's service, but was employed as cook on board a steam-vessel. Upon the defendant's application he enters into a special contract to serve on board of the defendant's ship. There can be no doubt, that if the special contract had

(*a*) 7 *D.* & *R.* 650.
(*b*) 1 *B.* & *B.* 515.
(*c*) 1 *B.* & *Ad.* 950.

been declared upon the plaintiff would have been entitled to recover. The question here is, whether, as the services have been rendered, the contract may not be declared on as an executed contract; and I am of opinion that it may. Perhaps, in strictness, it might be contended that the plaintiff's services were rendered to the Crown, and not to the defendant; but as the point was not taken at the trial it cannot now be raised. In the way the case comes before us, I think the plaintiff's leaving the employment in which he was then engaged, was a sufficient consideration for the plaintiff's promise; and that this rule must be discharged.

COLTMAN J. It is better to forbear giving any opinion on the supposed illegality of this contract. By the plea of non assumpsit, an *express* promise would be put in issue. Here, no promise is declared upon, but what would be implied by law in the event of any debt being found due to the plaintiff from the defendant. There can be no doubt that the defendant contracted with the plaintiff, that if he would enter on board his ship in the capacity of cook, he would pay him wages in addition to the pay allowed by government. I see no objection to such a contract beyond the question of illegality, which we cannot now consider. The plaintiff having rendered his services for a considerable period, a debt arose which might be sued for in some form or other. The debt existing, a promise to pay it would be implied by law. Upon the grounds already adverted to, this case is clearly distinguishable from *Harris* v. *Watson* and *Stilk* v. *Myrick*.

ERSKINE J. The plaintiff entered into the defendant's ship upon an express promise that the defendant would pay him wages beyond those received by an ordinary seaman; and relying on that promise, he performed the ser-

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vices for which this action is brought. The question is, whether any cause of action accrued to the plaintiff to demand wages beyond the pay to which he was entitled by his rating on the ship's books. As it is admitted that no objection can be raised on the ground of illegality, all difficulty, as it appears to me, is removed. The case is the same as if the contract had been, that in consideration of the plaintiff entering into the service of a third party, the defendant would pay him wages in addition to the wages given him by such party. In such a case, there being an express promise, it would be no answer to say that the plaintiff did not enter into the *defendant*'s service. An objection might probably have been raised to the form of the action; but as that objection was not taken at the trial, it cannot be urged now. The only question is, whether the plaintiff has any cause of action. The cases which have been cited on the part of the defendant are clearly distinguishable from the present. For the most part they turned on the want of consideration, the plaintiff being bound at the time of the contract to render the services which were alleged to be the consideration for such contract. Here, the contract was made at a time when the plaintiff was free, and was not bound to enter into the service. There was consequently a good consideration for the promise of the defendant.

MAULE J. I also am of opinion that this rule ought to be discharged. It has been very properly conceded, that any objection on the ground of illegality should have been pleaded. If any doubt existed as to the construction to be put upon the rule of *Hilary* term 4 *W.* 4., it has been removed by the recent decisions. It seems to me that the form of the declaration is sufficient.

With respect to the argument, that there was no consideration for the defendant's promise, I think that

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the defendant may be said to be indebted to the plaintiff for work and labour done for the former at his request. Though the work and labour may have been done for the Crown, it is not at all inconsistent with that supposition, that they may likewise have been done for the defendant. Supposing, however, the declaration to be insufficient, if the point had been taken at the trial, the declaration clearly would have been amended.

With regard to the authorities which have been cited to shew that no debt arose between the plaintiff and the defendant, there is this material distinction between the cases referred to and the present, that in those cases, contracts were entered into with parties who were already bound to do the work for which the extra-wages were to be paid. Here, the defendant, instead of contracting to do work which he was already bound to perform, was a free agent, perfectly *sui juris*, when he *entered* into the engagement.

With respect to the supposed illegality of the agreement entered into between these parties, although it is not requisite to discuss it, I do not think that there is much doubt upon the point.

Rule discharged.

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COLLIS *v.* GROOM.

An action of assumpsit for not returning goods let to hire by the plaintiff to the defendant, in which the damages laid in the declaration are under 20*l.* is not within the writ of trial clause (*s.* 17.) in the 3 & 4 *W.* 4. *c.* 42. And where such an action had been tried before the undersheriff, the court set aside the writ of trial and the subsequent proceedings.

ASSUMPSIT. The first count of the declaration stated, that in consideration that the plaintiff would let to hire to the defendant, a certain timber-carriage with chains, &c., to be had and used by the defendant, for a certain time agreed upon between them for reasonable hire and reward, the defendant promised the plaintiff that he would return the said timber-carriage and chains to the plaintiff at the expiration of the said period; that the plaintiff, confiding, &c., did let to hire to the defendant the timber-carriage, with chains, &c., to be had and used, &c. Breach: that at the expiration of the hiring, though the plaintiff had received back the said timber-carriage from the defendant, yet the defendant did not return the chains to the plaintiff, but wholly refused and neglected so to do: to the damage of the plaintiff of 5*l.* The declaration also contained indebitatus counts. Plea, non assumpsit.

At the trial before the undersheriff of the county of *Warwick*, the jury found a verdict for the plaintiff, damages 18*l.*

Sir *T. Wilde* Serjt., in last *Michaelmas* term, obtained a rule nisi to set aside the writ of trial, and the subsequent proceedings, on the ground that the action was not brought to recover a debt or demand, within the provisions of the 3 & 4 *W.* 4. *c.* 42. *s.* 17. (*a*)

Channell Serjt. now shewed cause. It is submitted that this is a case to which the writ of trial is applicable. *Price* v. *Morgan* (*b*), *Allen* v. *Pink* (*c*) are directly in point, and shew that the courts are inclined to extend,

(*a*) Which see, *antè*, 557.
(*b*) 2 *M.* & *W.* 53.
(*c*) 4 *M.* & *W.* 140.

rather than limit, the operation of the statute. *Watson* v. *Abbott* (*a*), and *Smith* v. *Brown* (*b*), are distinguishable, being actions of tort for unliquidated damages. In the recent case of *Walker* v. *Needham* (*c*), this court held that detinue, where the value of the chattel sought to be recovered, indorsed on the writ of summons, is under 20*l.* is triable before the sheriff, under the act.

Bompas Serjt. in support of the rule. The special count in this declaration is clearly upon a claim for unliquidated damages. [*Maule* J. The damages would not necessarily be confined to the value of the chains.] *Jacquot* v. *Boura* (*d*), shews that although a plaintiff choose to limit his demand to 20*l.*, the sheriff has no authority, under the act, to try a claim for unliquidated damages. It is clear that the demand in this case could not be the subject of a set-off. (*e*) *Needham* v. *Walker* was decided on the ground that detinue may be joined with debt, being an action of the like nature. (*g*)

TINDAL C. J. I am of opinion that the claim in this case cannot be called either a debt or a demand, within the statute. I think that it is a claim for unliquidated damages.

The rest of the court concurred.

Rule absolute.

(*a*) 4 *Tyrwh.* 64., 2 *C.* & *M.* 150.

(*b*) 2 *M.* & *W.* 851.

(*c*) *Antè*, p. 457.

(*d*) 5 *M.* & *W.* 155., *S. C. per* nom. *Jaquet* v. *Bower* 7 *Dowl. P. C.* 331.

(*e*) Acc. *Auber* v. *Lewis*, *Mann. N. P. Dig.* 251.; *Hardcastle* v. *Netherwood*, 5 *B.* & *Ald.* 93. The description, in the 2 *G.* 2. *c.* 22., and 8 *G.* 2. *c.* 24. of that which may be the subject of set off, is, "mutual debts;" in the writ of trial clause of the 3 & 4 *W.* 4. *c.* 42., the words are, "any debt or demand."

(*g*) *Vide tamen*, the distinction between detinue (*ex contractu*) *sur bailment*, and detinue (*ex delicto*) *sur trover*, *antè*, 557.

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Jan. 31. HAYES, an Infant by WILLIAM THOMPSON, his next Friend, *v.* CARR.

A rule was obtained by the defendant, calling on the plaintiff (an infant suing by his prochein amy) to give security for costs, on the ground that the latter could not be found at the place mentioned in the plaintiff's petition, and that the plaintiff's attorney on being applied to, had stated that he could not give more precise information as to his residence. The court discharged the rule with costs.

STEPHEN Serjt. on a former day in this term had obtained a rule to shew cause why the proceedings in this case, which was an action for an assault and false imprisonment, should not be stayed until security should be given for the payment of costs by *Thompson*, the prochein amy of the plaintiff, upon the ground that *Thompson* was not to be found at the place mentioned in the plaintiff's petition, and that the plaintiff's attorney on being applied to, had stated that he could not give more precise information as to his residence.

Bompas Serjt. now shewed cause. No authority can be found for the present application. The regular course would have been, to take out a summons calling upon the attorney to furnish *Thompson*'s address, and then to make inquiries as to his responsibility. [*Tindal* C. J. Is this application in the alternative, either to give security for costs, or to state where *Thompson* is? *Stephen* Serjt. There is no objection to moulding the rule in that form. *Tindal* C. J. What do you say to the rule in its present form? *Maule* J. It was held in *Yarworth* v. *Mitchel* (*a*), that an infant who sues by his prochein amy need not give security for costs, although it be sworn that the prochein amy is insolvent. *Erskine* J. In *Watson* v. *Frazer* (*b*), *Parke* B. seems to treat *Yarworth* v. *Mitchell* as overruled by *Mann* v. *Berthen*. (*c*) In *Watson* v. *Frazer* the prochein amy

(*a*) 2 *D.* & *R.* 423.
(*b*) 9 *Dowl. P. C.* 741.
(*c*) 4 *M.* & *P.* 215.

turned out to be an uncertificated bankrupt, and the court of Exchequer stayed the proceedings until he should give security for costs, or another prochein amy should be appointed.] That case proceeded on the ground that a sort of imposition had been practised on the court.

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Stephen Serjt. *contrà.* It is apprehended that this case is supported, in principle, by *Mann* v. *Berthen.* It would have been of no use to apply for a summons to obtain information from the attorney which he says he does not possess. [*Tindal* C. J. *Thompson* may have changed his lodgings.]

TINDAL C. J. It seems to me that the defendant has not done enough to entitle him to ask for security for costs; and he certainly has not gone the proper way to work to obtain the information he seeks.

The rest of the court concurred.

Rule discharged, with costs.

NASH *v.* SWINBURNE.

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IN this case judgment had been obtained against the defendant on the 15th of *February* 1840. On the same day a *fi. fa.* issued, under which the sheriff entered. On the 27th *Bosanquet* J. made an order at chambers

B.'s goods were taken in execution under a judgment obtained against him by *A.*, which was afterwards set aside for irregularity. *B.* having brought an action of trespass in the Exchequer against *A.* and his attorney, they justified under the judgment in this court, to which *B.* replied nul tiel record. A day was given to produce the record, and *A.* and his attorney were ruled to produce the record, and a judge's order was obtained for *A.* to bring in the roll. The roll, however, was not carried into the Exchequer until the day before that appointed for the trial by the record, and was brought in without any suggestion that the judgment had been set aside.

The court quashed (*qu.* vacated) the judgment roll with costs to be paid by *A.* or his attorney.

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(which was afterwards made a rule of court) to set aside the proceedings, for irregularity, and for the sheriff to withdraw from possession. There being no stipulation in the order, binding the defendant not to bring any action, he commenced an action of trespass in the court of Exchequer against the plaintiff *Nash*, and *Taylor* his attorney. The plaintiff *Nash* and *Taylor*, — having failed in an application to the learned judge to amend his order, by inserting a clause that no action should be brought, — pleaded, to the action in the Exchequer, not guilty, and also a justification under the judgment of the 15th of *February* 1841. Nul tiel record was replied to the latter plea, and a day was given (the 24th of *November*) to produce the record in that court. The plaintiff and *Taylor* having withdrawn the plea of not guilty, were ruled in the Exchequer to produce the record; and an order was made on the 15th of *November* directing the plaintiff and *Taylor* to bring in the roll. The order was not complied until the 23d, when a *certiorari* was left at the office, and the transcript returned into the Exchequer, which transcript did not contain any entry or suggestion that the judgment had been set aside. On the 24th, the day appointed for producing the record, a rule nisi was obtained by *Swinburne*, the plaintiff in the action in the Exchequer, to postpone the trial by the record until the fifth day of this term, and for payment of the costs by *Nash* and *Taylor*, the defendants in that court; which rule, on the second day of the term, was made absolute to postpone the trial by the record until the day before the expiration of the term, and that the defendants should pay the costs of the application.

Talfourd Serjt. upon an affidavit of the above facts, on a former day in this term, obtained a rule calling upon *Nash*, and *Taylor* his attorney, to shew cause, why the judgment roll should not be quashed, or why the

plaintiff *Nash* should not enter thereon the rule to set aside the judgment, or why the judgment should not be struck out of the roll, and why the plaintiff *Nash*, or *Taylor* his attorney, should not pay the costs of the application.

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The learned serjt. submitted, that the proceedings of these parties, amounted to a falsification of the record, with the view of imposing on the court of Exchequer.

Shee Serjt. now shewed cause. This is an unreasonable application. Every thing which the defendant *Swinburne* asks the plaintiff and his attorney to do, might, according to the practice of the court, be done by himself. He might have called upon us to carry in the roll, and might then himself have entered the suggestion.

There is another course which the defendant might have taken; namely, instead of replying nul tiel record, he might have replied, that the judgment had been set aside. *Jones* v. *Williams*. (*a*) [*Erskine* J. In that case no judgment had been recovered.] There was nothing to prevent the special matter from being pleaded. [*Tindal* C. J. Would not such a replication amount to a special nul tiel record? The objection to your conduct is, that you did not make up the roll until the last moment, and then did not enter any suggestion of the rule of court by which the judgment had been set aside.]

Talfourd Serjt, in support of the rule, contended the present motion was specially framed for the purpose of setting right the fraud of which the plaintiff *Nash* and his attorney had been guilty. [*Erskine* J. After the court of Exchequer remitted the record to this court, could not the defendant have entered the suggestion upon it?] That could have been done only by leave of the court.

TINDAL C. J. This rule ought to be made absolute. The plaintiff's attorney has acted most improperly.

(*a*) 9 *Dowl. P. C.* 702.

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In defiance of the order of the learned judge, he has thought fit to make up the record, and has attempted therewith to impose on the court of Exchequer, by seeking to produce that record in support of a plea of justification under a judgment which he knew had been set aside. It is quite clear that he was endeavouring to take an unfair advantage of the other party. Instead of immediately obeying the judge's order,—which was obtained on the 18th of *November*, directing the plaintiff to carry in the roll, in order that the defendant might have an opportunity of getting the rule for setting aside the judgment entered thereon,—he delays doing so until the 23d, the day before that on which the record is to be produced in the court of Exchequer. This was a trick on the part of the plaintiff's attorney, which ought to be visited with costs. The rule must be made absolute to quash the judgment-roll, the costs of the application to be paid by the plaintiff or by the attorney.

The rest of the court concurred.

Rule absolute accordingly.

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FITCH *v.* KETTLE.

A notice of declaration was delivered between 6 and 7 o'clock in the evening of *Saturday* the 22d of *January*, at the office of the defendant's attorney, to the defendant's son, who promised to give it to his father. The defendant was not at home until after 9 o'clock, and the notice was not delivered to him until the following morning, but it did not appear at what time the son returned home. A judgment for want of a plea, signed on *Thursday*, the 27th, was set aside without costs.

BOMPAS Serjt., on a former day in this term, had obtained a rule nisi to set aside the judgment signed in this cause, for irregularity. Notice of declaration had been delivered between six and seven o'clock in the even-

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ing of *Saturday*, the 22d of *January* last, at the office of the defendant's attorney to the defendant's son, who promised to deliver it to his father. It appeared that the defendant did not return home until after nine o'clock on that night, and the son did not give him the notice until the next morning. On the 27th judgment was signed for want of a plea.

Channell Serjt. now shewed cause. The alleged ground of objection to the judgment is, that there was no sufficient service of the notice of declaration on the 22d of *January*. It is submitted that the notice, not being one requiring personal service, was properly served on the defendant's son. In order to invalidate the service, the defendant should have shewn that his son did not reach home until after nine o'clock on that evening.

Bompas Serjt. in support of the rule. It is clear that the judgment is irregular, unless the notice of declaration was served on the defendant before nine o'clock on the evening of the 22d; and the onus lies on the plaintiff to shew that the notice was well served, and the judgment properly signed. The notice should either have been served on the defendant personally, or left at his dwelling-house. The service on the son was not sufficient. At any rate the plaintiff, in making such service, took the chance of the son reaching home before nine o'clock, and it is incumbent on him to prove that fact.

TINDAL C. J. It is better to adhere to the strict and usual mode of service of a notice of declaration. As the service in this case has not been made out, the rule for setting aside the judgment must be made absolute, but without costs.

The rest of the court concurred.

Rule absolute accordingly.

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BIGNALL *v.* GALE.

The cause, and all matters in difference between the parties having been referred upon the usual terms, the arbitrators made their award in favour of the plaintiff, and directed that the costs of the reference and award, to be taxed, should be paid by the defendant. The costs of the suit and the costs of the reference and award were included in one bill, and were taxed at 93*l*, for which the master gave one allocatur. No objection was made by the defendant's attorney, who signed the bill so settled. On the 4th of *June* judgment was taken for the debt, and the *whole costs* included in the allocatur, and registered pursuant to the 1 & 2 *Vict. c.* 110. *s.* 19. The plaintiff having died on the 8th of *November*, his executor, on the 12th of *January* 1842, issued a *sci. fa.* to revive the judgment, which was served on the 13th, and to which the defendant pleaded a false plea. On the 24th the defendant obtained a rule nisi to set aside the judgment, on the ground that *the costs of the reference and award* were improperly included in the judgment.

Held, that the including of such costs in the judgment amounted to a mere irregularity, which had been waived by the assent of the defendant's attorney at the taxation, and by the lapse of time.

ASSUMPSIT, to recover a balance of a general account, including the amount of two bills of exchange alleged to be due from the defendant to the plaintiff. Plea, non assumpsit.

At the trial before *Tindal* C. J., at the sittings at *Westminster* after *Hilary* term 1839, a verdict was entered for the plaintiff, damages 10,000*l.* subject to the award of two arbitrators, who made their award on the 8th of *January* 1841, directing the verdict to stand for 2736*l.*, and ordering that the costs of the reference and of the award, to be taxed, should be paid by the defendant to the plaintiff. (*a*)

The costs of the reference and award were taxed with the costs of the suit, in one bill, at the sum of 93*3l.*, and were included in one allocatur.

Manning Serjt. on a former day in this term, obtained a rule nisi, to set aside the judgment so signed, with costs, on the ground that the judgment was improperly signed for the costs of the reference and award.

(*a*) See *antè*, Vol. II. 830.

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Atcherley and *Channell* Serjts. now shewed cause upon affidavits, which stated that judgment was signed on the 29th of *April* 1841, and the costs taxed on the 4th of *June;* that the defendant's attorney made no objection to the entire costs being included in one bill, or to the master's giving one allocatur for the whole, but on the contrary, agreed with the plaintiff's attorney as to the amount of deductions, and the sum for which the allocatur should be made; and that both attorneys signed the bill so settled; that on the 4th of *June* 1841, the judgment was registered, pursuant to the 1 & 2 *Vict. c.* 110. *s.* 19.; that various proposals had since been made on behalf of the defendant for satisfying such judgment; that the plaintiff died on the 9th of *November* 1841; that on the 12th of *January* instant, his executor *Charles Bignall*, caused a writ of *scire facias* to be issued against the defendant to revive the judgment, which writ was duly served on the 13th, and was returnable on the 19th, that the defendant appeared thereto; that a declaration in *sci. fa.* was delivered, to which the defendant pleaded, that the judgment was obtained by the fraud and covin of the plaintiff and others in collusion with him, and with intent to defraud the defendant.

The costs of the cause, and of the reference and award, were properly included in one allocatur. At any rate, the objection amounts, in substance, to a complaint that the master has allowed more costs than he ought to have done. The defendant, therefore, should have applied for a rule to review the taxation. [*Tindal* C. J. Is not your best ground the length of time that has elapsed?] Supposing the allocatur to be incorrect, the defendant should have applied to set it aside. If he had taken that course, the answer would have been twofold; first the lapse of time; and secondly, that his attorney had consented to the taxation. At the utmost the

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allocatur is a mere irregularity, which has been clearly waived by the defendant. *Sloman* v. *Gregory*. (*a*)

Manning and *Shee* Serjts. in support of the rule. Where a reference is made, as this was, in the usual manner,—the costs of the suit to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator,—the latter costs cannot form part of the judgment, but are only recoverable by action or by attachment. [*Tindal* C. J. That is true; and if the defendant had insisted at the time, he might have had two separate allocaturs.] With respect to the alleged waiver, the attendance before the master did not amount to any acquiescence, except as to the accuracy of the individual items allowed to be correct; there was no acquiescence in the course pursued by the plaintiff in including the whole costs in one allocatur. It was the plaintiff's business to enter up the judgment for the damages and costs in the cause alone; he should either have selected the items, and added them up, or have applied to the master for that purpose. [*Tindal* C. J. The allocatur is signed by both attorneys. Is not that an acquiescence in the sum mentioned in it? *Maule* J. When had the defendant notice of the amount for which the judgment was signed? For, *primâ facie*, he is applying to set aside the judgment after an unreasonable lapse of time. *Tindal* C. J. When was the judgment registered?] On the 4th of *June*. [*Tindal* C. J. Then there was notice to all the world.] The judgment was only notice so as to charge the defendant's lands, but not to charge him with laches. The signing of judgment for a larger sum than was due, amounted to much more than a mere irregularity—it was a falsification of the record, which could not be waived or sanctioned by

(*a*) 1 *D. & R.* 181.

delay or acquiescence. There may be a collateral claim against the defendant, but the judgment is as false as if no such claim existed, and the court are bound to set it right. It is said that the objection in substance, is merely that the master has allowed an excessive amount of costs in the cause. But that is not so, — it is that he has allowed costs *out* of the cause. It is also argued, that the defendants should have come to the court to set the allocatur aside. But the defendant was not injured by the allocatur, which was correct so far as regards the general taxation of the costs; the fault was in the plaintiff signing judgment for the whole costs. [*Maule* J. As the allocatur is on the record you are injured by it if at all; for it says, in effect, that the whole costs are costs in the cause. The defendant might have set aside the judgment if it had been signed for a less sum than that named in the allocatur.] The judgment clearly ought to be reduced; and as the court have no means of reducing it, the only course that can be taken is, to set it aside. With respect to the alleged delay, it was occasioned partly by the negotiations between the parties, and partly by the death of the plaintiff.

TINDAL C. J. It appears to me that the objection to this judgment, resolves itself into a mere irregularity, to which two answers may be given; — the one, that all that was done was with the consent of the defendant; and the other, that the application to the court has been made after an unreasonable lapse of time. On the parties going before the master, the plaintiff's attorney produced a bill, to which no objection was made by the defendant's attorney, on the ground of its including the costs of the reference and award as well as those of the suit. On the contrary, they went over the bill together, and agreed on the

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deductions and on the amount for which the master's allocatur was to be given; and they both signed the bill, as settled by him. It is true, that the defendant's attorney might have insisted on two separate allocaturs; but he probably dispensed with them to avoid useless expense. Had there been a distinct allocatur for the costs of the reference and award, each might have been made a rule of court, and each would then have had the effect of a judgment under the eighteenth section of the 1 & 2 *Vict. c.* 110. There was a distinct assent to the course pursued on taxation; and, after that, the defendant has no right to complain. And in addition to that, look at the length of time which has elapsed. It would be very unjust if the defendant, who in the meanwhile may have parted with his lands, was now at liberty to raise the objection, which, if taken at the time, might at once have been set right. He clearly must have known that the judgment could only be signed for the whole of the costs mentioned in the allocatur, yet he takes no step, but allows it to pass. The plaintiff dies; and his executor sues out a *scire facias*, to which the defendant pleads a plea that is not true (*a*); and after all these proceedings he seeks to get the judgment set aside. (*b*) Under the circumstances of this case, I am of opinion, that the rule should be discharged with costs.

The rest of the court concurred.

Rule accordingly.

(*a*) The time for moving to set aside the award having been suffered to pass, the plea could be established only by fraud *in signing the judgment*. Proof of collusion between the plaintiff and the arbitrators, would not have supported the plea.

(*b*) The motion was made for the *chance* of relieving the defendant from the false position in which the conduct of his former attorney had placed him; there having been no pretence for the arbitrators (who were laymen) awarding him to pay 2736*l.* or any such sum, and sufficient grounds having existed for an application to set aside the award.

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TRESPASS, for breaking and entering the close, mill, manufactory, and yard, of the plaintiff, and seizing and carrying away certain fixtures and machinery, and also certain goods and chattels of the plaintiff.

The defendant took out a summons for leave to plead—first, not guilty; secondly, a denial of the plaintiff's possession of the close, &c. and his property in the fixtures and machinery, goods and chattels; thirdly, that one *Taylor*, being seised in fee, demised the close &c. in which, &c. to one *Berner*, who demised to one *Kerrison*, who demised to one *Reddall*; that *Reddall* becoming bankrupt, his assignees demised to *Freeman*, who demised to *Hunt*, who became bankrupt; that the defend-

In trespass for breaking and entering a close &c. of the plaintiff, and carrying away certain fixtures and certain goods and chattels of the plaintiff, the defendant was allowed to plead,—first, not guilty: secondly, a denial of the plaintiff's property in the goods and chattels, (but not of his possession of the close, and fixtures): thirdly, a demise to *A.*, who became bankrupt; that the defendants were appointed assignees, whereby they became entitled to the possession of the close, &c., and entered and committed the alleged trespasses, giving colour to the plaintiff: fourthly, a similar demise to *A.*, and then alleging that *A.* mortgaged to *B.* and continued in possession as tenant to *B.*; that *A.* became bankrupt, his tenancy under *B.* not having been determined; that the defendants were appointed assignees, and elected to continue tenants to *B.*, and entered and committed the alleged trespasses, giving colour to the plaintiff: fifthly, that *A.*, being possessed of the close, &c., for the residue of a certain term, demised to *B.* by way of mortgage, and continued in possession as tenant to *B.*; that after the mortgage, *A.* placed certain trade fixtures on the close, &c.; that *A.* and *B.*, in order to defraud the creditors and assignees of *A.* of those fixtures (*A.* expecting shortly to be made a bankrupt), demised to the plaintiff; that *A.* became bankrupt, and that the defendants were appointed assignees and entered.

It is not requisite that an affidavit used in shewing cause against a rule, should be sworn before such rule is due: and *semble*, that it is no objection to the using of an affidavit, that it was made after the discussion of the rule had been postponed in consequence of the party shewing cause having omitted to take office-copies of the affidavits upon which the rule had been obtained.

Semble, that no affidavit is necessary to shew that an attorney, obtaining a rule in a cause, is not the attorney on the record.

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ants were appointed his assignees, whereby they became entitled to the possession of the close &c., and entered and committed the alleged trespass, giving colour to the plaintiff: fourthly, a plea similar to the third down to the demise to *Hunt*, then alleging that *Hunt* mortgaged to one *Rogers*, and continued in possession as tenant to him; that *Hunt* became bankrupt, his tenancy under *Rogers* not having been determined; that the defendants were appointed *Hunt's* assignees, and elected to continue tenants to *Rogers*, and entered as such and committed the alleged trespasses, giving colour to the plaintiff: fifthly, that *Hunt* being possessed of the close &c. for the residue of a certain term therein, demised the same to *Rogers* by way of mortgage; that *Hunt* continued in possession as tenant to *Rogers;* that after the mortgage, *Hunt* placed certain trade fixtures on the demised premises; that *Hunt* and *Rogers*, in order to defraud *Hunt's* creditors and assignees, of those fixtures (he expecting shortly to be made a bankrupt) demised to the plaintiff; that *Hunt* became bankrupt, and that the defendants were appointed his assignees, and, as such, entered upon the premises.

Coltman J. having made an order that the defendants should be at liberty to plead the first plea, and *any one* of the others,

Manning Serjt. on a former day in this term obtained a rule to rescind the order of the learned judge, and that the defendants should be allowed to plead the whole of the proposed pleas. He contended that the defendants were entitled to put the second plea on the record in order to raise the question of order and disposition; and that with respect to the 3d, 4th, and 5th pleas, distinct questions of title are raised by those pleas. He cited *Morse* v. *Apperley* (*a*). [*Erskine* J. It has been

(*a*) *Post*, 866.

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decided in the Exchequer (*a*) that fixtures are not within the 6 *G.* 4. *c.* 16. *s.* 72. The defendants ought not to deny the plaintiff's possession of the *close;* the words "close" and "fixtures" therefore should be struck out of the second plea.]

Bompas Serjt. on appearing to show cause on a former day, not being prepared with an office-copy of the affidavit, the discussion of the rule was adjourned. (*b*) He now objected (on an affidavit sworn the day after that on which the adjournment had been allowed) that *Manning* Serjt. was not entitled to be heard, as he was not instructed by the attorney on the record, and no order to change the attorney had been obtained.

Manning Serjt. contended, that *Bompas* Serjt. had no right to avail himself of a fresh affidavit sworn subsequently to the time, when, but for the plaintiff's neglect, cause would have been shewn against the rule. The plaintiff is seeking to derive an advantage from the circumstance of his having wrongfully omitted to bespeak an office-copy of the affidavit; an advantage which, but for that omission, he could not have taken.

Bompas Serjt. With respect to this point no affidavit is required. If the rule had been made absolute, we should have been entitled to come to the court, and get it discharged, on the ground that the attorney in the motion, was not the attorney on the record.

TINDAL C. J. I am not aware of any positive rule, that an affidavit must be sworn before the regular time for shewing cause. As regards my brother *Bompas*'s

(*a*) See *Boydell* v. *M'Michael*, 3 *Tyrwh.* 974., 1 *C. M. & R.* 177., *Clarke* v. *Bulmer*, 11 *M. & W.* 243, in the Exchequer; and *Cooper* v. *Meyer*, 10 *B. & C.* 468., 5 *Mann. & R.* 387., in K. B.

(*b*) *Vide post*, 883.

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objection, we may ask my brother *Manning* for whom he appears, and may then look at the record. I think that all these objections had better be waived, and the case heard upon the merits.

Bompas Serjt. The three pleas denying the possession of the plaintiff are substantially the same, varied merely in circumstance, and are put on the record in order to entrap the plaintiff. The second plea will embrace every possible defence that the defendants can set up.

Manning Serjt. in support of the rule. The principle on which this motion is to be decided, is distinctly laid down in *Morse* v. *Apperley* (*a*). There, in trespass *quare clausum fregit*, the defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed; thirdly, that the defendant was seised in fee; fourthly, that *A. B.* was seised in fee, and that the defendants, by his command, committed the trespass complained of, &c. A summons having been taken out to strike out the third and fourth pleas, the judge refused to make any order; whereupon an application for that purpose was made to the court; and it was held, that the third and fourth pleas might be pleaded together with the second, as they were not necessarily founded on the same ground of answer or defence, within the meaning of the rule of *H.* 4 *W.* 4. [*Maule* J. In that case the application was, to strike out pleas: this, is to set aside a judge's order on an application at chambers to be allowed to plead several matters under the statute of *Anne*.] It is apprehended that there is no distinction between the two cases; the decision of the judge at chambers was merely a matter of form, in order to refer the question to the court. [*Maule* J. In the one case a plea cannot be

(*a*) 6 *M. & W.* 145., 8 *Dowl. P. C.* 203.

struck out except it infringes the rule. Here, it is an appeal to the discretion of the court.] The defendants ought not to be restricted to one plea; for if the three pleas are true, which they must be taken to be, there are three defects in the plaintiff's title to recover against the defendants. [*Maule* J. Your third and fourth pleas are inconsistent; if the latter be true, the former is not.] They are formally inconsistent, in the same manner as in trespass, a plea of not guilty is inconsistent with a plea of justification. The fifth plea alleges circumstances which amount to fraud; and it is conceived that under the other pleas the defendants would not be entitled to go into such a defence. The defendants, being assignees, are bound to protect the bankrupt's property by means of every title which they can make available. [*Tindal* C. J. You are anxious, I presume, to get certain matters admitted.] Yes. If the assignees were obliged to rest their defence on one plea, they would have to prove a long deduction of title.

TINDAL C. J. The only question is, whether it will be an indiscreet exercise of the power given by the statute of *Anne*, to allow the three last pleas to be put on the record. With respect to the fifth plea, which alleges a fraud to which the plaintiff was a party, it stands on a different footing from the other two, and ought to be allowed. The question then remains, whether the defendants should be permitted to plead the third and the fourth pleas. It appears that under the third plea, the defendants mean to contend that the title to the whole term, after various mesne assignments, vested in the bankrupt, and came to them as assignees; and the fourth plea is the same with the third down to the vesting of the term in the bankrupt, and then it alleges that the bankrupt mortgaged the premises to *Rogers*, who subdemised them to him, and that the defendants entered

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as his assignees, under such subdemise. I am not prepared to say — though down to a certain point these pleas are the same — that there may not be circumstances connected with the residues of the pleas, which entitle the assignees to put them both on the record. I think, on the whole, that they must be also allowed.

The rest of the court concurred.

Rule absolute — omitting the words "close" and "fixtures" in the second plea.

Jan. 28.

SHEPHERD *v.* PYBUS.

Upon the sale of a barge by the builder, a warranty of fitness for the purpose for which it is known by the builder to be purchased, is implied, notwithstanding a written instrument containing the terms of the sale, is silent as to any warranty.

But if the vendee declare as upon a warranty that the barge was reasonably fit for use, and assigns a breach in the barge not being reasonably fit for use, the breach is not supported by evidence that the barge was not fit for a special purpose for which the builder knew that it was designed.

ASSUMPSIT. The declaration stated, that on the 14th of *May* 1838, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy of the defendant, a new barge then lying at the defendant's wharf, for the sum of 675*l.*, the said barge to be rigged and fitted out with all necessary stores, in the same manner as the new barge sold by the defendant to the plaintiff two years before that time. And the plaintiff agreed to pay for the first-mentioned barge as follows, that is to say, to place in the hands of the defendant the barge bought of him two years before that time, with all the materials and stores as when purchased by the plaintiff, at the price of 400*l.*, and to pay the remaining 275*l.* by his promissory note at twelve month's date, bearing interest at 5*l.* per cent., the said note to be joined in by the plaintiff's son *Charles Shepherd*. That the defendant by then, to wit, on the said &c.,

falsely and fraudulently warranting the first-mentioned barge, *being a new barge and made and built by the defendant*, to be reasonably fitted for use, caused and procured the plaintiff to agree as aforesaid, and sold and disposed of the first-mentioned barge to the plaintiff as aforesaid, upon the terms in that behalf aforesaid; that afterwards, to wit, on the 25th of *June* in the year aforesaid, in pursuance of the said sale of the first-mentioned barge, and of the said agreement in that behalf, the defendant delivered the first mentioned barge to the plaintiff as the purchaser thereof as aforesaid, and the plaintiff as such purchaser as aforesaid, then accepted and received the same of and from the defendant; that the plaintiff in pursuance of the said agreement in that behalf, then placed in the hands of the defendant, who then accepted and received of the plaintiff at the said price of 400*l.*, the said barge which was to be placed in the hands of the defendant as aforesaid, with all the materials and stores as when purchased by the plaintiff, and that the plaintiff then, to wit, on the day and year last aforesaid, paid to the defendant the remaining 275*l.* by such promissory note as aforesaid, and which note was joined in by the plaintiff's said son the said *Charles Shepherd*, according to the said agreement in that behalf: whereas in truth and in fact, the first-mentioned barge was not, at the time of the said warranty and sale thereof as aforesaid, or when the same was delivered to the plaintiff as aforesaid, reasonably fit for use, but, on the contrary thereof, the same barge was at those times, leaky and in a bad and leaky condition, and altogether unfit for use. By means whereof not only the last-mentioned barge became and was of little or no use or value to the plaintiff, but also thereby and by means of divers large quantities of water leaking and entering into the last-mentioned barge by reason of the same being in such condition, and so

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unfit for use as aforesaid, divers large quantities of cement, to wit, *fifty casks of cement*, and twenty tons weight of cement of the plaintiff, of large value, to wit, of the value of 100*l.*, which the plaintiff was carrying and conveying by and in the lastmentioned barge, became and were greatly wetted, damaged, and wholly spoiled; and also, by means of the premises, the plaintiff was not only put to a great expense, to wit, an expense of 100*l.*, and became liable to pay a large sum of money, to wit, 100*l.*, for, in, and about the surveying and examining of the lastmentioned barge, and endeavouring to render the same fit for use, and for the wages of divers, to wit, three persons by him employed in and about the navigating and managing of the lastmentioned barge, but for divers long spaces of time whilst he was causing the lastmentioned barge to be surveyed and examined, and whilst he was endeavouring to render the same fit for use, lost and was deprived of all use and benefit of the same barge; and thereby, and otherwise by means of the premises, the plaintiff has been and is greatly injured, &c.

Pleas: first, not guilty; secondly, that the defendant did not agree to sell to the plaintiff, nor did the plaintiff agree to buy of the defendant the said barge in the declaration in that behalf mentioned, upon the terms in the declaration specified, in manner and form as therein alleged; concluding to the country; thirdly, that he did not, by warranting the said barge to be reasonably fit for use, cause and procure the plaintiff to agree, as in the declaration mentioned, and sell and dispose of the said barge to the plaintiff, in manner and form as in the declaration was in that behalf alleged (*a*); concluding to the country. Issue thereon.

At the trial of the cause before *Tindal* C. J., at the *London* sittings after *Trinity* term, 1840, it appeared

(*a*) *Vide antè*. 791.

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that the plaintiff was a manufacturer of cement at *Faversham*, in *Kent*, having a wharf in *London;* and that the defendant was a timber-merchant and barge-builder at *Maidstone*. On the 14th of *May* 1838, the following agreement was made and signed by the parties:—

"*Maidstone*, *May* 14th, 1838.

"Memorandum. *Thomas Pybus* has this day agreed to sell to *Samuel Shepherd*, and the said *Samuel Shepherd* has agreed to buy, a new barge now lying at the said *Thomas Pybus*'s wharf, for the sum of 675*l.*; the said barge to be rigged and *fit* out with all the necessary stores, in the same manner as the new barge sold by *Thomas Pybus* to *Samuel Shepherd* two years ago. And the said *S. Shepherd* agrees to pay for the said barge as follows, viz. to place into the hands of *Thomas Pybus*, the barge bought of him two years ago, with all the materials and stores as when purchased by the said *S. Shepherd*, at the price of 400*l.*, and to pay the remaining 275*l.* by his promissory note at twelve months' date, bearing interest at the rate of 5 per cent. per annum; the said note to be joined in by his son *Charles Shepherd*."

It appeared, that previously to the above agreement, the barge was in progress of building, and was lying afloat alongside of the defendant's wharf, where it had been seen by the plaintiff. The barge was afterwards rigged and completed, and was delivered to the plaintiff towards the end of *June*. It was proved that the defendant knew that the barge was to be used in carrying cement from the plaintiff's manufactory at *Faversham* to his wharf in *London*. The barge made two voyages in *July*, and another in *August*, and on each of those occasions she made so much water that the cargo received considerable damage. It was at length found necessary to sheath her with fir in order to render her watertight,

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and fit for carrying cement. This evidence was objected to on the part of the defendant, as not being admissible; for as no fraud was charged, and there was no express warranty, the agreement being in writing, no such warranty could by law be implied as that which was stated in the declaration. *Chanter* v. *Hopkins* (*a*) was cited. The evidence was, however, received, subject to the opinion of the court as to whether it was admissible, and whether, under the circumstances, the warranty stated in the declaration could be implied by law: the Lord Chief Justice leaving it to the jury to say, whether at the time of the sale, the barge was reasonably fit for use.

A verdict having been returned for the plaintiff, damages 90*l.*, being the amount of damage to the cargoes on the several voyages, and of the expenses incurred in the repairs of the barge,

Channell Serjt. in *Michaelmas* term, 1840, obtained a rule *nisi* to enter a nonsuit, on the ground taken at the trial — citing *Gray* v. *Cox* (*b*), and *Chanter* v. *Hopkins*, and referring to *Brown* v. *Edgington* (*c*) as involving the same point — or for a new trial, by reason of the verdict being against the evidence.

Talfourd Serjt. (with whom was *Hoggins*) in *Easter* term last shewed cause. The question is, whether, under the circumstances of this case, a warranty of the fitness of the barge is to be implied. The law on this subject has recently been considered in this court, in *Brown* v. *Edgington*, which was very similar to the pre-

(*a*) 4 *M.* & *W.* 399.

(*b*) 4 *B.* & *C.* 108., 6 *Dowl.* & *Ryl.* 200. *S. C.* at nisi prius, 1 *C.* & *P.* 184.

(*c*) Since reported, *antè* Vol. II. 279. That case was tried at the sittings after *M. T.* 1839, not 1840, as might be inferred from the words "after *last Michaelmas* term," used in the report, p. 282.; which would be correct, if referred to *H. T.* 1840, the time when the application was made, p. 284.

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sent case. There, the plaintiff, a wine merchant, ordered a crane rope of the defendant, a dealer in, and who represented himself as a manufacturer of, ropes. The defendant's foreman thereupon ascertained the nature and dimensions of the rope required, and was told that it was wanted to raise pipes of wine from a cellar. The defendant did not make the rope himself, but sent the order to his manufacturer, who employed a fourth party to make the rope. It was held, that as between the defendant and the plaintiff, the former was to be considered as the manufacturer of the rope; and that an implied warranty arose out of the contract, that the rope was a fit and proper rope for the purpose for which it had been ordered. *Tindal* C. J. there says, "It appears to me to be a distinction well founded both on reason and on authority, that if a party purchase an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he rely upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed." In *Gray* v. *Cox* (*a*), *Abbott* C. J. stated that he was strongly inclined to the opinion, that "if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." So, in *Jones* v. *Bright* (*b*), it was held that if a man sell an article for a particular purpose, he thereby warrants it fit for that purpose; and that doctrine was recognised in *Chanter* v. *Hopkins*. (*c*)

(*a*) 4 *B.* & *C.* 108., 6 *D.* & *R.* 200., 1 *C.* & *P.* 184.

(*b*) 5 *Bingh.* 533., 3 *M.* & *P.* 155.

(*c*) 4 *M.* & *W.* 399.

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The latter case is distinguishable from the present case; for there the plaintiff defined in his written order the particular article to be supplied, and he was mistaken in supposing that it would suit him. *Laing* v. *Fidgeon* (*a*); *Gardiner* v. *Gray*. (*b*) Here, the plaintiff could not himself form any opinion as to the seaworthiness of the barge. By looking at it he would merely see that it had the shape of a barge; he therefore necessarily relied on the judgment of the defendant, who knew the purpose for which it was designed, and who should have taken care that it was a barge not only in form but in substance. The complaint here is, not that the barge does not suit the plaintiff, but that it is not at all fit for use; and the jury have in effect found that fact by their verdict.

With respect to the second branch of the rule, the question was one for the jury. It was fairly left to them by the Lord Chief Justice; and the evidence amply justified the conclusion to which they came. There is, therefore, no ground for disturbing the verdict.

Channell Serjt. in support of the rule. The authorities cited for the plaintiff have no application to the case of the purchaser of a specific article. The law, as laid down in *Gray* v. *Cox*, is not disputed. All the judges were agreed in that case, that supposing a warranty, that the article sold shall be fit for the purpose for which it is supplied, can be superadded to the written contract, still no general warranty, such as is here declared on, can be implied. *Jones* v. *Bright*, which was decided in this court, carries the matter no further. In *Brown* v. *Edgington*, the seller was expressly directed to supply a rope for a particular purpose. There was not, as in this case, the sale of a specific article already in existence, which the party had an oppor-

(*a*) 6 *Taunt.* 108., 4 *Campb.* 169. (*b*) 4 *Campb.* 144.

tunity of inspecting, and which he did inspect. In *Chanter* v. *Hopkins*, which very nearly resembles this case, *Parke* B. says, "The whole turns on the construction of the written order: you cannot import any addition into it which is not in writing; and you do not impute fraud." In *Parkinson* v. *Lee* (*a*) it was held, that upon a sale of hops by sample, with a warranty that the bulk should be all of the like goodness and quality, the law does not raise an implied warranty, that the commodity shall be merchantable, although the price paid was the fair market price at the time for good merchantable hops. *A fortiori*, where, as here, the article is sold not by sample, but by bulk. [*Tindal* C. J. The purchaser would have better means of knowing the quality.] In *Bluett* v. *Osborne* (*b*), a bowsprit was sold by the plaintiff to the defendant, which, at the time of the sale, appeared to be sound. It afterwards turned out to be rotten. It was held by Lord *Ellenborough*. C. J. that, as no fraud was complained of, the plaintiff was entitled to recover to the extent of the apparent value at the time of delivery. The rule in this case is to be taken from *Chanter* v. *Hopkins*.

Shee Serjt. on the same side. The real question between the parties is, whether the construction of the written contract can be controlled by extrinsic matter. The plaintiff seeks to add to the written contract the words, "which barge is reasonably fit for use." If those words could be added, still the meaning would be, "fit for such uses as barges are usually put to." When referring to the cases which have been cited, it is assumed that here the barge was sold for a particular purpose. It is said that the defendant knew the purpose to which it was to be applied. But that is not the meaning of the contract in this case. In *Gray* v. *Cox*, which was an

(*a*) 2 *East*, 314. (*b*) 1 *Stark. N. P. C.* 384.

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action in respect of the improper sheathing of a ship, though Lord *Tenterden* ruled, at nisi prius, that if a person sell a commodity for a certain purpose, he must be understood to warrant it reasonably fit and proper for such purpose, the other judges did not support that ruling. In *Brown* v. *Edgington*, the particular purpose was expressly stated, as is stated in the judgments pronounced by *Tindal* C. J. and *Bosanquet* J. Here, if any warranty is to be implied, it is, that the barge shall be fit to float; and if properly used the barge would have floated. In all the cases cited, the specific purposes for which the articles were required were mentioned. One most important qualification to be introduced into all cases of this description, is that, although a specific purpose be mentioned, yet if the individual article be pointed out, no implied warranty arises. In *Chanter* v. *Hopkins*, the article ordered was particularly described by a reference to the specification and patent; and, therefore, although the object of the order appeared upon the face of the letter containing the order, yet it was held, that as the order defined the thing wanted, the plaintiff was justified in sending it, though wholly unfit for the purpose to which it was to be applied. Here, if it could have been shewn that the article supplied by the defendant was *not a barge*, he would have been entitled to maintain his action.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This was an action to recover damages for a breach of an implied warranty upon the sale of a barge to the plaintiff, in which the plaintiff recovered a verdict for 90*l.* damages; and the questions for our decision were argued upon a motion for a new trial: first, upon a point of law reserved at the trial; and, secondly, upon the ground that the verdict was against the evidence.

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The declaration was in case, and, in substance, stated that the defendant had sold to the plaintiff a barge, the same being a new barge built by the defendant, and that the defendant induced the plaintiff to purchase such barge, by warranting "that the barge, being a new barge, was *reasonably fit for use*." The declaration then averred that, in fact, the barge was not reasonably fit for use, and stated special damage as the consequence of the breach of such warranty. To this the defendant pleaded: first, not guilty; secondly, a traverse of the agreement of the defendant to sell, and of the plaintiff to buy, the barge on the terms stated in the declaration; and, thirdly, a traverse that the defendant caused the agreement to be made by warranting the barge.

Upon the trial a memorandum of agreement in writing between the plaintiff and the defendant, was given in evidence, in these words: — "*Thomas Pybus* has agreed to sell to *Samuel Shepherd*, and *Samuel Shepherd* to buy, a new barge now lying at *Thomas Pybus*'s wharf, for the sum of 675*l.*, the said barge to be rigged and fitted out with all necessary stores, in the same manner as the new barge sold by *Thomas Pybus* to *Samuel Shepherd* two years ago," and then follows a statement as to the mode and time of payment. It was proved that defendant was a boat and barge builder, and that the barge in question had been built by him, and, at the time of entering into the contract, was nearly finished, and was afloat on the defendant's premises, where it was afterwards rigged and fitted up according to the agreement, and removed by the plaintiff, and employed by him in carrying cement in casks from *Faversham* to *London*, in the way of his trade. It was also proved, that the defendant knew the purpose for which the barge was purchased by the plaintiff; and that the barge, upon trial, was found to be so defectively built as to let in considerable quantities of water, whereby a cargo of

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cement had been damaged, and that the plaintiff had been obliged to incur expense in repairing the barge, and rendering it fit for use in his particular business.

An objection was made at the trial to the admissibility of this evidence, upon the ground — that the written contract given in evidence, contained no such warranty as that stated in the declaration,— that no express warranty whatever had been proved,— and that no such warranty could be implied by law. But, by consent of both parties, the evidence was admitted, subject to the opinion of the court upon the question,— whether the same could be properly received,— and whether, under the circumstances of the case, the law would imply the warranty stated in the declaration. And I left it to the jury, upon the evidence on both sides, to say, whether the barge, at the time of the sale, was, in the language of the declaration, reasonably fit for use. The jury having found a verdict for the plaintiff, a motion was made for a nonsuit or a new trial, and two questions were raised; first, whether any such warranty as that stated in the declaration can, under the circumstances of this case, be implied by law; and, secondly, whether the evidence supports the verdict of the jury — that such warranty has been broken. As to the objection against the admissibility of the evidence, on the ground that the contract being in writing, no such warranty could be implied, we think the distinction to be taken is, that where the warranty is one which the law implies, it is clearly admissible, notwithstanding there be a written contract. The ordinary case, in which an agreement to farm according to the custom of the country, is held to apply to a tenancy, where the contract to hold as tenant is in writing, but is altogether silent as to the terms or mode of farming (*a*), affords a sufficient instance of the

(*a*) *Vide White* v. *Nicholson*, *post*, Vol. IV. 95.

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general principle; and a similar warranty to that now in question was held to be implied in the case of *Gardiner* v. *Gray*. (*a*) The real question therefore is, will the law imply such a warranty under the circumstances of this case?

On the part of the plaintiff it was contended, that in every contract of sale there is an implied warranty, that the article sold is reasonably fit for the use for which it purports to be designed; and that, in this case, as the defendant was the builder of the barge, and knew the purpose for which it was purchased by the plaintiff, the law will imply the warranty, that the barge was reasonably fit for use with reference to that purpose; and that the evidence was sufficient to shew that, in the state in which the barge was delivered out by the defendant, it was unfit for use as a barge for any purpose, and especially for the purpose for which it was sold; and the case of *Brown* v. *Edgington*, *Gray* v. *Cox*, *Jones* v. *Bright*, *Laing* v. *Fidgeon*, and *Gardiner* v. *Gray*, were cited and relied upon.

On the part of the defendant it was urged, that this case was distinguishable from that of *Brown* v. *Edgington*, by the circumstances that the rope, which was there the subject of dispute, was to be made, or procured to be made, by the seller, for the particular purpose pointed out by the purchaser, who had no opportunity of inspecting the article before it was furnished and fixed by the seller; and that the rope was purchased upon the faith of the seller's skill and knowledge, and not upon the inspection or judgment of the purchaser, upon which ground alone that case was decided; and it was further insisted that where, as in the present case, the bargain was for a specific chattel, of which the purchaser had an opportunity of making inspection,

(*a*) 4 *Campb.* 144.

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and which he actually had inspected after it was built and before the agreement for purchase was made, no warranty as to the quality of the article can be implied; and that, unless there be an express warranty, or fraud can be proved, no action can be maintained by the purchaser for any defect he may afterwards discover in the article purchased; and in support of this position, the cases of *Parkinson* v. *Lee*, and *Bluett* v. *Osborne* were cited and relied on.

Parkinson v. *Lee* was the case of the sale of hops by sample, upon which sale the plaintiff had, by the second count of his declaration, engrafted the implied warranty that they should be good, sound, and marketable hops; and Mr. Justice *Le Blanc*, in leaving the case to the jury, directed them, that if they were satisfied that the commodity, at the time of the sale, had such a latent defect as no prudence or skill of the buyer could, on inspection, detect, or guard against, the plaintiff was entitled to recover on the implied warranty in the second count, although the seller had no knowledge of such latent defect; and the plaintiff had a verdict upon this ruling. The court of King's Bench, upon argument, with the assent of Mr. Justice *Le Blanc*, held this direction to be wrong, and set the verdict aside. But if the reasons given by *Grose* J. and *Lawrence* J. be examined, their opinions will not be found to affect the question now before the court; for they both lay great stress upon the fact that the seller was not the grower of the hops, and that the purchaser, by the inspection of the sample, had as full an opportunity of judging of the quality of the hops as the seller himself. And in the case of *Bluett* v. *Osborne*, although Lord *Ellenborough* held that the seller was not responsible for a latent defect in a bowsprit, which, upon being cut, proved to be rotten in the core, yet he expressly states his opinion, that a person who sells, impliedly warrants

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that the thing sold shall answer the purpose for which *i* is sold. And the decision of that case is consistent with that principle, when qualified by the reasons given in *Parkinson* v. *Lee*; for in both cases, the purchaser had as full an opportunity of judging of the quality of the articles purchased as the seller himself. But in the case now before the court, the subject of the purchase was a barge built by the seller himself; and the purchaser had had no opportunity of inspecting it in its progress, and the defects which were afterwards discovered, were not apparent upon inspection, and could only be detected upon trial; and therefore the two last-cited cases cannot be held to govern the present.

Taking, however, the general rule to be that which is laid down by Lord *Ellenborough* in *Bluett* v. *Osborne*, and qualifying it by the decisions cited for the plaintiff, we are of opinion that the warranty stated in the declaration may, at all events, be fairly implied from the nature of the transaction out of which this action arises, whatever difficulty there might be in implying a warranty that the barge was fit for the particular purpose for which it was intended by the purchaser, according to the rule laid down in *Chanter* v. *Hopkins*. Indeed there was not in this case, any evidence of distinct notice, or of a declaration, to the defendant, at the time the plaintiff inspected the barge or entered into the contract, of the precise service or use for which the barge was purchased by the plaintiff. Upon the question, therefore, whether the verdict was against evidence, we are not satisfied that the jury have come to a right conclusion when they find that the barge was not reasonably fit for use as an ordinary barge; which is the meaning and extent of the warranty laid in the declaration and implied by law; and therefore, upon this ground, we think the rule should be absolute for a new trial; but,

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at the same time, as it was not brought distinctly before the jury, whether the terms of the warranty were only applicable to the general use of the barge, or whether they extended to a reasonable fitness for use for the particular purpose for which it was intended by the buyer, we think the costs should abide the event of a new trial.

Rule absolute accordingly.

Jan. 15.

COSBY *v.* BETTS.

When a rule is enlarged upon the motion of the party required to shew cause, with the usual proviso that the affidavits used against the rule shall be filed a certain number of days before the ensuing term, the party cannot use affidavits which have not been so filed, and he will not be allowed a further postponement of the rule unless he has been prevented by some special cause from filing his affidavits within the specified time.

A RULE for judgment as in case of a nonsuit, obtained by *Ludlow* Serjt. in last term, had been enlarged on the motion of the plaintiff. The enlarged rule, which was drawn up and served, contained the usual proviso (*a*), that the affidavits to be used in shewing cause against the rule, should be filed (*b*) a week before the first day of the then next (the present) term.

Stephen Serjt., now rising to shew cause upon an affidavit which he produced, but which had not been filed, having been sworn after the time limited in the rule,

Ludlow Serjt., insisted that it could not be read.

(*a*) *Vide Tidd*, 9th ed. 502. A rule was enlarged, on the ground that the party obtaining it had delayed to serve it, without requiring that the affidavits should be filed *Regina* v. *Anderson*, 9 *Dowl. P. C.* 1041. And see *Memorandum*, 6 *Scott*, 400.

(*b*) Whereby the opposite party has an opportunity of inspecting the affidavits; which he may use, after taking office copies, although the party by whom they were filed, should elect not to use them; *Price* v. *Haymon*, 4 *M. & W.* 8., 7 *Dowl. P. C.* 49.

Stephen Serjt., applied for a further postponement.

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TINDAL C. J. The rule cannot be further enlarged, unless it be made to appear to the court that the plaintiff was prevented by some special circumstance from complying with the terms upon which he obtained the former postponement (*a*), or by consent of both parties. No reason has been shewn for taking this case out of the ordinary rule; and the defendant does not consent to its being so taken. The rule must therefore be made absolute.

The other judges concurred.

Rule absolute. (*b*)

(*a*) *Vide R. M.* 36 *G.* 3. K.B.; *antè*, 865.

(*b*) And see *Lewis* v. *Kirby*, 8 *Scott*, 179.

PHELPS *v.* KEILY.

Jan. 17.

A RULE for a special jury, obtained by the defendant on the 11th of *January*, not having been served until the 15th, after notice of trial had been given, *Bompas* Serjt. moved to discharge such rule. A rule nisi having been granted,

A rule for a special jury obtained by the defendant (or by the plaintiff in replevin) will be discharged if there be unnecessary delay in serving it.

Channell Serjt., now shewed cause upon an affidavit of merits. The affidavit upon which the rule was obtained, does not state, nor does it any way appear, as in *Gunn* v. *Honeyman* (*a*), that the plaintiff had not sufficient time to secure the attendance of a full jury. The defendant has complied with the rule of *H. T.* 1 *Vict. s.* 3. (*b*)

Bompas Serjt. *contrà*. The defendant was bound on the day after the motion was made, to apply at the office

(*a*) 2 *B. & Ald.* 400., 1 *Chitt. Rep.* 234.

(*b*) 4 *New Cases*, 366.; *Jerv. Rules*, 153.

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for the rule which he had obtained, and to serve the rule as soon as it was issued from the office. By *R. H.* 1 *Vict.* it is ordered, "That no rule for a special jury be granted on behalf of any defendant, or plaintiff in replevin, except on an affidavit, either stating that no notice of trial has been given, or, if it had been given, then stating the day for which such notice has been given; and in the latter case no such rule is to be granted unless such application be made for it more than six days before such day." (*a*) It would be useless to fix the time of the application if the party were at liberty to defer the service of the rule.

TINDAL C. J. The defendant should shew by the diligence which he uses, that he is really desirous of his cause being tried by a special jury.

The other judges concurred.

Rule absolute. (*b*)

(*a*) 4 *New Cases*, 366.; *Jerv. Rules*, 153.

(*b*) *Vide Chuck* v. *Harris ante*, Vol. I. 941.

Jan. 29.

PAGE *v.* DOUGHTY.

After a *bonâ fide* compromise of a cause, not entered into for the purpose of cheating the attorney of his costs, the court will not make absolute a rule for judgment as in case of a nonsuit, or require the plaintiff to give a peremptory undertaking to try.

A RULE for judgment as in case of a nonsuit, had been obtained, for not proceeding to trial pursuant to notice given for the spring assizes for the county of *Warwick* in 1841.

Shee Serjt. now shewed cause, upon an affidavit stating, that in *March* 1841, after the notice of trial, and before the assizes, it had been agreed between the plaintiff and the defendant, that proceedings should be

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stayed, each party paying his own costs. It would be idle to require a peremptory undertaking under these circumstances. It is obvious that this motion is made on behalf of the defendant's attorney. He has his remedy against his own client for his costs; and there is no ground for suggesting that the arrangement between the parties was made for the purpose of defeating his chance of recovering those costs from the plaintiff.

Andrews Serjt. in support of the rule. The compromise between the parties behind the back of the attorney was a fraud upon him. [*Erskine* J. Parties may enter into a compromise in the absence of their attorneys, unless the settlement be effected for the purpose of cheating the attorney of one party of his remedy against the opposite party.] When this motion was made, the answer which is now set up could not be anticipated. If there were the opportunity of so doing, it is highly probable that it would be shewn that the compromise, if any really exists, was entered into for the very purpose of cheating the defendant's attorney.

TINDAL C. J. I think we cannot make this rule absolute, or require the plaintiff to give a peremptory undertaking; but the costs should be costs in the cause. The defendant has it in his power to carry the record down to trial by proviso.

The rest of the court concurring —

Rule discharged. (*a*)

(*a*) And see *Elias* v. *Elias*, 9 *Dowl. P. C.* 104.

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GAUNT and Others *v.* TAYLOR and Others.

A judgment against an executor need not (before the 2 & 3 *Vict. c.* 11.) have been docketed under the provisions of the 4 & 5 *W. & M. c.* 20., in order to entitle it to preference over simple contract debts in the administration of a testator's assets.

THE following case was sent by the Master of the Rolls (Lord *Langdale*) for the opinion of this court: —

Jonathan Taylor late of *Leeds*, in the county of *York*, land-surveyor deceased, not being a trader subject to the bankrupt laws, was indebted at the time of his death (which took place on the 7th of *January* 1830), to the executors of *Richard Stringer* deceased, in 1200*l.* on simple contract, for money lent by the said executors to the said *Jonathan Taylor* in his lifetime.

The said *Jonathan Taylor* by his will, dated the 12th of *February* 1825, and a codicil thereto (of which he appointed his wife *Hannah Taylor*, *T. W. Tottie*, and *J. H. Shaw*, executrix and executors), made certain parts of his real estate liable to the payment of his debts. He afterwards made and completed purchases of other real estate, whereby his personalty was reduced and became insufficient for the payment of such debts.

For the purpose of obtaining payment, the executors of *Richard Stringer*, in 1830, brought an action in the Common Pleas against the executors of *Taylor* for recovery of the said 1200*l.* and interest. Mrs. *Taylor* (who before her marriage with the testator was the widow of the said *Richard Stringer*), severed her defence from that of her co-executors, withdrew her former plea of "*plenè administravit*," which had been pleaded by all the executors, and pleaded *de novo*, viz., "*plenè administravit præter*;" admitting assets in hand consisting of household furniture and effects to the amount of 400*l.* and upwards, and 383*l.* money in the hands of the bankers paid in by, and then standing in the joint names of, the three executors. Upon this, a *nolle prosequi* was

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entered on the plea of the two executors, with judgment of assets *in futuro* as against them, and judgment against Mrs. *Taylor* for the assets confessed, with an award of a writ of inquiry to assess the damages.

The following entry appears on the prothonotaries' judgment-roll, but no number of the judgment roll is stated.

"*Trinity* term, 11 *G.* 4., 1830.

"*Yorkshire.* Entry of *nolle prosequi* and judgment of assets *in futuro.*"

"*Waterhouse* and others, executors, plaintiffs. 761. (*a*)

"*Taylor* and others, executrix and executor, defendants." 762. (*a*)

The writ of inquiry was executed on the 2d day of *November* 1830, and on the 11th, final judgment was signed. The judgment obtained was for the said 1200*l.* and 83*l.* 13*s.* for interest and the costs of the action. Upon the judgment execution was issued, and the household furniture of the testator was seized by the sheriff; and, on the 26th of *November* 1830, the sum of 400*l.* 9*s.* 5*d.* was raised by the sale thereof, leaving 880*l.* 3*s.* 7*d.*, due on the judgment.

The following entry appears on the docket-roll:

		Damages.	County.
	"*Michaelmas* Term, 1 *W.* 4.		
"*Taylor, Hannah, Tottie, T. W.*	and another, executrix and executor of *Jonathan Taylor*, to answer *William Waterhouse, Elias Holt*, and *William Cooper*, executors of *Richard Stringer* -	£1280 13 0	*Yorkshire.*
	Michaelmas Term, 1 *W.* 4.		
"*Shaw, John Hope, and Others.*	executrix and executor of *Jonathan Taylor*, to answer *William Waterhouse, Elias Holt*, and *William Cooper*, executors of *Richard Stringer* - - -	£1280 13 0	*Yorkshire.*"

The case, after setting out a copy of the judgment, proceeded as follows: —

(*a*) The number of the docket-roll.

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A creditors' bill in Chancery was filed by one of the creditors on behalf of himself and the other unsatisfied creditors of the said *Jonathan Taylor*, against the executors in the month of *June* 1830, for an account and an equal distribution of his assets; and a decree was obtained in such suit, on the 22d *June* 1831, being after the said judgment was obtained. Under the decree the judgment creditors proved for the balance of their debt.

The executors of *Richard Stringer*, by the proceeds of their said levy, have received about 6*s.* 8*d.* in the pound on their original demand, and they have petitioned the court to be allowed to receive the 880*l.* 3*s.* 7*d.*, the remainder of their judgment debt out of assets standing in the name of the accountant-general, in priority to the simple contract creditors.

The plaintiff and the other simple contract creditors having opposed the prayer of this petition, the matter has been argued before the Master of the Rolls; and, by an order made in the said cause on the 5th of *December* 1840, it was ordered that a case should be made for the opinion of the judges of this court; and it was ordered that the questions in such case should be —

First, whether it was necessary to docket the judgment recovered by *Elias Holt*, *William Waterhouse*, and *William Cooper*, against the defendants *Hannah Taylor*, *Thomas William Tottie*, and *John Hope Shaw*, as executors of *Jonathan Taylor* deceased, the testator, in order to give preference against those executors, in the administration of the testator's estate, in pursuance of the statute 4 & 5 *W. & M. c.* 20. And if the judges of this court shall be of opinion that it was necessary to docket such judgment, then,

Secondly, whether such judgment was duly docketed.

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Stephen Serjt. for the plaintiffs. It is submitted that this judgment should have been regularly docketed; and not being so, it can have no preference over general creditors: for, by the 4 & 5 *W. & M. c.* 20. (*a*), it can rank only as a simple contract debt. It is clear, that by the statute, no judgment was to have any preference, unless it were properly docketed. There were two descriptions of dockets. The prothonotaries kept a register of every judgment, — which judgments, however, were not entered alphabetically, — and that was called the docket or prothonotaries' roll. Beside this there was the docket book kept by the clerk of the essoigns, pursuant to the statute, in which the names were entered alphabetically. When any judgment was to be entered on the roll, the practice was, for the attorney to obtain a proper number roll, enter thereon the judgment, and then take it to the clerk of the essoigns, who made out the docket, and carried in the roll. It is stated in the return of the prothonotaries (First Report on Public Records, Appendix F. 1. Feb. 26th, 1800) that among the public records and rolls in their custody are "docket-rolls which contain the nature of the pleadings, description of the actions, counties in which revenues are laid, names of the attorneys and parties, and the number-

(*a*) Which, after reciting that "great mischiefs and damages happen, and come as well to persons in their lifetimes, but more often to their heirs, executors, and administrators, and also to purchasers and mortgagees by judgments entered upon record in Their Majesties courts at *Westminster*, against the persons defendants, by reason of the difficulty there is in finding out such judgments;" and for remedy thereof, enacting, by sect. 2., that all judgments for debt by confession, *non sum informatus*, or *nil dicit*, shall be docketed in the manner therein mentioned, by sect. 3., provides, "that no judgment not doggetted and entered in the said books as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, *or have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates', estates.*"

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rolls in all causes the records whereof are filed in the treasury of this court in Westminster Hall." The return of the deputy clerk of essoigns (Appendix F. 2. Feb. 26th, 1800) states that, "he has in his custody as deputy clerk of the essoigns, sundry parchment books, wherein are entered and kept in alphabetical order by the defendant's surname, pursuant to the statute of the 4 & 5 *W. & M. c.* 20. *s.* 2., a docket of all the final judgments entered in the court of Common Pleas, which he extracts from the records of such judgments every term, and afterwards carries and lodges the said records in the treasury of the said court at Westminster Hall." It will be contended that a judgment obtained against an executor need not be docketed — that an executor, being a party to the record, is fixed without any notice. If the only object of the statute had been to protect an executor against judgments of which he had no notice, the argument might prevail; but the intention was general, namely, to protect purchasers, mortgagees, &c. [*Coltman* J. Do you contend that an executor might safely pay simple contract creditors after notice of such a judgment as this?] Yes. According to the statute such a judgment is to have no preference. [*Tindal* C. J. The other side mean to contend that the act applies only to judgments obtained against the testator.] That argument cannot be supported without cutting down the words of the act; for it is clear that the statute was not passed merely for the protection of executors. It was held in *Hickey v. Hayter* (*a*), that a debt on a judgment against a testator or intestate, not docketed according to the directions of the statute, is by that act put on a level with simple contract debts. And in *Steel* v. *Rorke* (*b*) it was determined, that an outstanding judgment against a testator or intestate,

(*a*) 6 *T. R.* 384. (*b*) 1 *B. & P.* 307.

not docketed according to the directions of the act, cannot be pleaded by an executor or administrator to an action on simple contract. That case is a direct decision, that an executor cannot set up a judgment not docketed; and it goes a long way to decide the question before the court. There can be no distinction between a judgment recovered against a testator and an executor. [*Maule* J. Would a judgment against an executor, *de bonis propriis*, require to be docketed?] Such a judgment could not be obtained, except in the case of a *devastavit*. In *Hall* v. *Tapper* (*a*),—where to *scire facias* on a judgment, the defendant, an executrix, pleaded that she fully administered *before she had notice of the recovery*, and that she had no assets since,—the plaintiff replied, that the defendant had notice of the recovery, on, &c., and had assets afterwards; and it was held, that the mention of notice in the plea was surplusage, and the replication bad, as leading to an immaterial issue; for a judgment to be entitled to preference in administration, must be docketed pursuant to the stat. 5 *W. & M. c.* 20., and notice of it in any other way is of no consequence. [*Tindal* C. J. To whom do you say, the words "purchasers or mortgagees" apply? Do they not apply to purchasers or mortgagees from parties against whom the action is to be brought?] It is submitted that the clause applies to heirs and executors generally: it evidently extends to the heir or executor of the party who owes the debt; and there is nothing in it limiting the words, "purchasers or mortgagees," to parties taking from the testator himself; at any rate, the words, "or have any preference against heirs," &c., are quite distinct from the former part of the clause. The effect of obtaining a judgment against an executor for a simple contract debt,

(*a*) 3 *B. & Ad.* 655.

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is, that the party recovering it may require it to be paid in preference to other creditors by simple contract, in the same manner as in the case of a judgment against the testator. That a judgment against an executor stands on the same footing as one recovered against his testator, appears from *Ashley* v. *Pocock* (*a*); *Wentworth's Office of Executors*, 145.; and *Hancock* v. *Prowd.* (*b*), where the form of pleading a judgment against an executor is given; *Prince* v. *Nicholson.* (*c*) [*Maule* J. Does the plea state that the judgment was docketed?] No, for the statute did not alter the established rules of pleading. [*Maule* J. Is there any case of a replication to a judgment against an executor, that it was not docketed? Cases on such a judgment must be common.] It is usual to docket a judgment of *quando acciderint*, and a form for docketing such a judgment is to be found in *Impey's Practice*, 367. 10th ed. If the great object of the act had been to protect executors only, it would have been differently worded. In *Edrich's* case (*d*), "the judges said they ought not to make any construction against the express letter of the statute; for nothing can so express the meaning of the makers of the act as their own direct words, for *index animi sermo*; and it would be dangerous to give scope to make a construction in any case against the express words, when the meaning of the makers doth not appear to the contrary, and when no inconvenience will thereupon follow; and, therefore, in such cases, a *verbis legis non est recedendum.*" Here, the "direct words" of the statute are clearly opposed to the construction contended for by the other side.

The learned serjeant then proceeded to argue that, assuming the judgment to require to be docketed, it had not been duly docketed in accordance with the

(*a*) 3 *Atkyns*, 208.
(*b*) 1 *Wms. Saund.* 331.
(*c*) 5 *Taunt.* 333.
(*d*) 5 *Co. Rep.* 118 *b.*

provisions of the statute; but as the certificate by the court to the Master of the Rolls turned entirely on the first question, the argument on this point is omitted. The learned serjeant relied chiefly on the objection, that the docket contained no number-roll; and cited *Braithwaite* v. *Watts*. (*a*)

Channell Serjt. for the judgment creditors (*b*). If this case depended on the question whether this judgment had been properly docketed, it might be difficult to contend that the docketing here was strictly in compliance with the act.

But the important point is, whether the statute required this judgment to be docketed; and it is submitted that it did not. The act was evidently passed for the protection of parties taking, by representation, the property of another, but taking it liable to incumbrances, and was not intended to apply to judgments obtained against a representative. [*Tindal* C. J. The statute in the preamble seems to point out the distinction.] The cases which have been cited have little or no bearing on the present case. In *Hickey* v. *Hayter* and *Steele* v. *Rorke*, the judgment was against the intestate, and in *Hall* v. *Tapper*, it was against the testator. Those three cases clearly leave the statute untouched as to the question now to be decided. The court ought to pause long before they hold, that as to the party against whom the judgment has been recovered, there can be no other notice than by docket. In equity, the rule as to the distribution of assets, is the same as at law. *Morrice* v. *The Bank of England* (*c*), *Abbis* v. *Winter* (*d*). In *Williams on Executors*, 800, 3d ed., it is stated, "A judg-

(*a*) 2 *Tyrwh.* 293., 2 *Cro. & J.* 319.

(*b*) *Talfourd* Serjt. appeared for *Hannah Taylor*, and *Spankie* Serjt. for *Tottie* and *Shaw*, but took no part in the argument.

(*c*) *Swanston*, App. 573.

(*d*) *Ib.* App. 578. n.

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ment against the executor or administrator himself is not to be considered within the same class as those which are recovered against the deceased. *Wentworth's Office of Execut.* 270.(*a*) Such a judgment stands altogether on a different footing. It may be briefly stated in this place that, with respect to other creditors of the deceased, a creditor who has obtained judgment against the executor, has no priority except with regard to debts of equal degree with that upon which he has obtained judgment. Among such, his debt is allowed the precedence, because the executor ought to pay that creditor first who uses the first diligence. *Ashley* v. *Pocock* (*b*). Therefore the executor may plead in bar to an action by a simple contract creditor, that there is a judgment unsatisfied, which another simple contract creditor has obtained against him, the executor, and that it will exhaust the assets to satisfy that judgment; but such a plea is not allowable in an action by a creditor of superior degree, as upon a bond of which the executor had notice, or a judgment which has been docketed." The object of an executor in confessing a judgment, is, clearly, to give the party obtaining it a preference. It would be a singular thing if a creditor, by issuing a writ, should gain a preference, and then, by not docketing the judgment, should not obtain it after all. By the construction now contended for, it is not necessary to exclude the words in the preamble "as well to persons in their lifetimes" from having any operation. The second section may possibly apply to all judgments; and the third may make judgments, not void altogether, but only less operative.

Stephen Serjt., in reply. The language of the preamble shews, that the protection of parties taking by

(*a*) 14th ed. (*b*) *3 Atk.* 208.

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representation was not the only object in view, but the intention was generally to protect creditors and all parties interested in the administration of assets. Supposing a creditor to bring an action against an executor who pleads a judgment recovered against himself, the creditor is entitled to search in order to see if there is any error on the record, &c. It may be admitted that a judgment when recovered would have precedence over simple contract debts, if it were not for the provisions of the statute. The only difference between a judgment obtained against a testator, and one recovered against an executor is, that the former would not have preference over the latter; in all other respects they are alike, and the same protection is required against the one as against the other.

The following certificate was afterwards sent to the Master of the Rolls:—

"We have heard this case argued by counsel, and are of opinion that it was not necessary to docket the judgment recovered by *Elias Holt*, *William Waterhouse*, and *William Cooper*, against the defendants *Hannah Taylor*, *Thomas William Tottie*, and *John Hope Shaw*, as executors of *Jonathan Taylor* deceased (testator), in order to give the preference against the executors in the administration of the testator's estate, in pursuance of the statute of the 4 & 5 *W. & M. c.* 20.

"N. C. TINDAL.
"T. COLTMAN.
"W. H. MAULE." (*a*)

(*a*) See now the 2 & 3 *Vict. c.* 11., by which the 4 & 5 *W. & M. c.* 20. was repealed as to the docketing of judgments, and other provisions made for the registration of judgments. See also the 1 & 2 *Vict. c.* 110. *s.* 19.; 3 & 4 *Vict. c.* 82. *s.* 2.; 2 *Sugd. Vendors & Purchasers*, 10th ed. 401.; 2 *Wms. Executors*, 3d ed. 804.

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Jan. 11.

SHOOBRIDGE v. WARD.
WELD v. WARD.

Upon a feigned issue — whether, from time immemorial, there has been and is within the parish of *A.*, a *certain known portion* of the said parish consisting of lands called *uplands*, and whether from time immemorial there has been paid and payable by the occupiers of the lands called *uplands*, a district-modus of 4*d.* for every acre of such lands, the affirmative of the issue is established by proving, that there are lands in the parish which have immemorially been known as *uplands*, which have paid a modus of 4*d.* per acre, although no precise boundary line between the *uplands* and other lands not covered by the modus, can be shewn.

FEIGNED issue (in *Shoobridge* v. *Ward*) to try whether, from time whereof the memory of man is not to the contrary, there has been and is within the parish of *Tenterden*, in the county of *Kent*, a certain known portion of the parish consisting of lands called *uplands*, and whether from time whereof, &c. down to the time when the vicarage of the parish was created and endowed, there was paid and payable to the rector of the said parish for the time being, by the occupiers of the said lands called *uplands* by equal half yearly payments, at *Lady-day* and *Michaelmas-day* in every year, or so soon after as lawfully demanded; the district modus, or customary payment, of 4*d.* for every acre of such lands occupied by such occupiers, the homestead and garden (if any) being included in such acreage, for and in lieu of and in full satisfaction of all tithes due, or alleged to be due, except of corn and hay; and whether from the time when the said vicarage was created and endowed, the said district modus, or customary payment became, and ever since has been, and now is, due and payable in like manner to the vicar of the said parish for the time being.

In *Weld* v. *Ward* the issue raised the same question, substituting townlands for uplands, and 6*d.* per acre for 4*d.*

At the trial before Lord *Denman* C. J., at the last spring assizes for the county of *Kent*, it was proved

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that the parish of *Tenterden* contains three descriptions of land, viz. uplands, townlands, and marshlands; that a modus had been immemorially paid of 4*d.* an acre for uplands, 6*d.* for townlands, and 8*d.* for marshlands; that there was a natural boundary distinguishing the marshlands, but that there was no *certain known boundary* between the uplands and the townlands. It distinctly appeared that the land of the plaintiff *Shoobridge* was partly marshland, and that the remainder was within that portion of the uplands in respect of which no question of boundary arose.

On the part of the defendant it was contended, that the plaintiff not having shewn a precise and ascertained boundary between the uplands and the townlands, had failed in establishing the affirmative of the issue, that there was a certain known portion (*a*) of the said parish consisting of lands called uplands. For the plaintiff it was insisted, that it was sufficient to prove that there were parts of the parish known by the name of uplands, in respect of which a modus of 4*d.* per acre had been immemorially paid.

The learned judge told the jury, that it was incumbent on the plaintiff to shew, — first, that there was a certain known portion of the parish called uplands, — and, secondly, that a modus of 4*d.* per acre existed in respect of the uplands: that as to the latter point, there appeared to be little room for doubt; but that with respect to the first point, it seemed to be impossible to say, that the plaintiff had shewn that the uplands formed

(*a*) The question appears to turn upon the sense to be affixed to the ambiguous word "certain," to which the defendant assigns the meaning of the definite term "*certus*," while the plaintiff treats it as equivalent to the indefinite, "*quidam*." Some obscurity is also caused by the use of the word "known;" the plaintiff understanding the term "known portion," as a portion known to exist, the defendant treating it as meaning a portion the *extent* of which is known.

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any certain known district within the parish; that there appeared to be no means of distinguishing between the uplands and the townlands, except by drawing some boundary line; that it was not enough to shew the lands of the plaintiff were within an undefined district called the uplands, the question raised by the issue being—whether there is a certain known portion of the parish of *Tenterden*, in respect of which there is a district modus or customary payment of 4*d.* for every acre of such lands.

The jury having upon this direction found a verdict for the defendant.

A similar verdict was taken in *Weld* v. *Ward.*

April 20.

Sir *Thomas Wilde* Serjt., in *Easter* term last, moved for a new trial in both cases, on the ground of misdirection, and of the verdict being against evidence; both objections resting upon the same point. The effect of the issue appears to have been totally mistaken. It may be doubtful whether *Blackacre* is upland or townland; but that doubt has nothing to do with the question whether there is land called "uplands." The question of boundary was for the tithe commissioners. According to the course taken at the trial, if the occupier of one acre had sometimes paid 6*d.*, which is the modus for townlands, and sometimes 4*d.*, which is the modus for uplands, he would have destroyed the district modus altogether. A rule nisi being granted,

Bompas and *Stephen* Serjts., in *Hilary* term, shewed cause. The plaintiff was bound to shew the existence of a particular district known by the name of uplands; *Scott* v. *Allgood* (*a*); *Wood* v. *Wray* (*b*); *Gillibrand* v. *Scotson* (*c*); *Rudd* v. *Champion.* (*d*)

(*a*) 4 *Gwill. Tithe Cases*, 1369.

(*b*) 3 *Anstr.* 838., 2 *Eagle & Younge*, 436.

(*c*) 4 *Price*, 267., 1 *Wilson Exch. Rep.* 130., 1 *Daniell*, 27., 3 *Eagle & Younge.* 839.

(*d*) 1 *Younge*, 173.

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Sir *T. Wilde* and *Channell* Serjts. (with whom was *Bramwell*), *contrà*. It was the duty of the tithe commissioners to ascertain what was the quantity of land covered by the particular modus, and to apportion the money payment accordingly. The commissioners are charged with the duty now sought to be thrown upon the jury and the plaintiff. The argument on the other side goes to this extent—that the vicar may say, "Unless you can point out the boundary of the uplands, there are no uplands." If the titheable character of one acre become uncertain from the operation of sales or otherwise, though you could shew that every other acre within the district had been covered by the modus, it might be said, "Here is uncertainty, the modus is void." If a district modus is bad *in toto*, where the precise boundary cannot be pointed out, many parochial moduses would fail on the same ground, it not being unusual to find a parish with a disputed boundary. In *Maddison* v. *Nuttall* (*a*) the circumstance of the boundary of the district having been varied from time to time by the removal of hedges &c., was held to be immaterial; it appearing clearly that the defendant's land was within the district. *Rudd* v. *Wright*. (*b*)

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. These were issues directed by this court, under the tithe-commutation act, 6 & 7 *W.* 4. *c.* 71., in which the questions raised for the jury were — first, whether there was a certain known portion of the parish of *Tenterden*, consisting of lands called uplands; and whether there was an immemorial district modus, or customary payment, of 4*d.* per acre, in lieu of vicarial tithes of those lands: and, secondly, a similar question as to

(*a*) 6 *Bingh.* 226., 3 *M.* & *P.* 544.

(*b*) 1 *Younge*, 147.

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lands called townlands, and a distinct modus, or customary payment, of 6*d.* per acre, in respect of those lands. The jury having found their verdict on each of these issues for the defendant, application has been made to us, in both cases, for a new trial, on the ground that the learned judge who tried the cause misdirected the jury, and also that the verdict was against the evidence.

These issues arose out of a claim set up by the parishioners, that all the lands in the parish had been immemorially exempted from payment of vicarial tithes in kind, and that the vicar was entitled, in lieu thereof, to a certain modus, or customary payment, per acre, varying in amount according as each parcel of land belonged to three known descriptions of land within the parish. It was alleged that the parish consisted of two descriptions of land, plainly distinguishable from each other by their position and quality, namely, marshlands and uplands; and that the marshlands had always paid a modus of 8*d.* per acre. This was admitted by the vicar, and was so found by the tithe-commissioner; and as to that portion of the parish there is no dispute. But it was further alleged by the parishioners, that of the remainder of the parish, one portion had been immemorially known by the name of townlands, and had paid 6*d.* per acre in lieu of tithes, and the remainder by the name of uplands, and had paid 4*d.* per acre; both being clearly distinguishable from the marshlands by their position and quality, but not distinguishable from each other by any natural mark or boundary; and it was admitted that the extent of each could only be ascertained by evidence of reputation and of the customary payments immemorially made in respect of each.

It was under these circumstances that the present issues were directed; and the point which we intended

should have been submitted to the jury,—and which we thought at the time the form of the issue was capable of raising,—was, whether it appeared to the jury, either by reputation or other evidence, that there were parts of the parish, either lying together or separated from each other and insulated, known by the name of townlands, and which from time immemorial had paid a modus,—not as a farm modus, but a district modus,—of 6*d.* per acre; for if such should be the opinion of the jury, it appeared to us that such lands might well be held to constitute a certain known portion of the parish, and that no objection could be made to such construction, either on the ground of their being disjoined from each other and lying in different directions from the town, nor again because no certain and definite limit or boundary could be traced so that all the lands which fell within such limit or boundary were to be considered as townlands, and all which lay without it as uplands; for if in various parts of the parish, some particular lands were shewn to have been known as townlands from the earliest times, and their several limits to be assignable, and the modus of 6*d.* per acre to have been paid in respect of them, it appeared to us that they ought not to lose the character and description of townlands merely because the limit or boundary of other lands claiming also to be townlands was left in doubt or uncertainty. As if, for example, the claim had been made in respect of 500 acres within the parish belonging to different occupiers, as being townlands, and the situation and limits of part only of this quantity were proved to the satisfaction of the jury; but as to the other part was left in doubt and obscurity, we thought, and still think, the affirmative of the issue, viz. that there was a certain known portion of the parish called townlands, might properly be found by the jury. If we put the case that the issue had been, whether lands

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were within a certain known hamlet being part of a parish, and had paid a certain modus per acre, although the boundary line of the hamlet might in some parts be indistinct or altogether uncertain, yet if there were some lands which were clearly, and beyond all contradiction, within the hamlet, we cannot but think the jury might be satisfied of the fact with respect to those lands. In fact, the question in this case is, not whether any particular man's land was within the portion of the parish called townlands (supposing such portion to exist), for that would be a question for the commissioner to decide when the claim is made before him, but whether there is any such portion of the parish at all.

It appears, therefore, to us, that the attention of the jury has not been called to the precise point for which the issue was intended; though undoubtedly the issue is so framed as to be open to the interpretation given to it by the learned judge at the trial, and which certainly is not an unreasonable interpretation. (*a*) Without anticipating what the verdict of the jury will be when the issue is explained to them in the manner in which we have above expounded it, we think the plaintiffs in the respective causes are entitled to have the opinion of a jury upon the issue when accompanied with that explanation. (*b*)

Rule absolute.

(*a*) *Antè*, 897. (*a*) The defendant might fairly say, "By my construction of the language of the issue, I give effect to all the terms which you have introduced into it; but you, after electing to insert the words "certain" and "known," now seek to reject those words as nugatory.

(*b*) See *Ward* v. *Pomfret*, *antè*, Vol. I. p. 559.

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IN THE COMMON PLEAS,

EASTER VACATION, 4 VICTORIA.

TRIAL AT BAR.

Before TINDAL C. J., BOSANQUET J., COLTMAN J., and ERSKINE J.

1841.
May 10. 11.
1842.
Jan. 20.

PADDOCK *v.* FORRESTER and Another.

TRESPASS. The declaration stated that the defendants, on the 1st of *January* 1834, and on divers, &c., with force and arms, broke and entered divers closes of the plaintiff, situate in the parish of *Stoke-upon-Trent*, in the county of *Stafford*, to wit, &c., and then with shovels, dug up, turned up, and subverted the earth and soil, to wit, &c., and then dug, made, and sunk divers mines, pits, shafts, and holes of great breadth and depth, to wit, &c., in the said several closes of the plaintiff, and then from and out of the said mines, pits, shafts, and holes so dug, &c.; and also out of certain other mines, pits, shafts, and holes theretofore dug, made, and sunk in and upon the said closes respectively, then raised, dug, and got divers large quantities of *coals*, *culm*, *earth*, *soil*, *stones*, *ore*, *and other minerals* of the plaintiff, to wit, &c. &c., then being of great value, to wit, &c., and the same so raised, dug, and gotten from and out of the said mines, pits, shafts, and holes, they, the

A prescription to enter and dig for minerals, *making compensation*, is an *entire* prescription, and will not support the affirmative of an issue taken upon a plea justifying under a prescription to enter and dig for minerals, omitting the qualification as to making compensation.

But in a plea stating such prescription correctly, it is not necessary to allege that compensation has been made or tendered.

Where a letter written by one of the parties to a dispute to the other, is expressed to be "without prejudice," neither that letter nor the answer to it can be given in evidence on the part of the writer of the first letter, although the answer is not expressed to be "without prejudice."

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defendants, then seised, took, and carried away, and converted to their own use; and on the several days and times aforesaid, they, the defendants, with feet in walking, and with cattle, and with the wheels of, &c., trod down, &c., by means of which premises the plaintiff was, during all time aforesaid, greatly hindered, and disturbed in the peaceable and quiet enjoyment of the said several closes.

First plea, not guilty.

Second plea, — to the raising, digging, and getting from and out of the said mines, pits, shafts, and holes, the said quantities of *coals*, culm, earth, soil, stones, *ore, and other minerals*, and seizing, taking, and carrying away, and converting the same to the defendants' own use; that the said coals, culm, &c., at the said several times when, &c., were not, nor was any of them, the coals, &c. of the plaintiff; concluding to the country.

Third plea, — to the breaking and entering the said closes, and with shovels, &c. digging up and subverting the earth and soil of the said closes, and digging, making, and sinking the said mines, pits, shafts, and holes, and out of the said mines, pits, shafts, and holes; and also out of the said other mines, pits, shafts, and holes raising, digging, and getting the said quantities of culm, earth, soil, and stones, and with feet in walking, and with the said cattle, and with the wheels of, &c. treading down, &c.; that the said closes in which, &c., were situate in the townships of *Shelton*, otherwise *Shulton*, and *Handley*, otherwise *Hanley*, in the parish and county aforesaid, or (*a*) one of them; and at the said several times when, &c., and from time whereof, &c. had been and still were within and parcel of the manor of *Newcastle-under-Lyme* in the county aforesaid; and that the said township of *Shelton*, and also the said

(*a*) This would have been bad upon special demurrer, for uncertainty.

township of *Handley* during all the time aforesaid, had been and still were within the said manor; and that long before the several times when, &c., to wit, on the 18th of *April* 1807, our late sovereign lord King *George* the Third was seised, in his demesne in fee, in right of his duchy of *Lancaster*, of and in the said manor of *Newcastle-under-Lyme*, and of and in the collieries, mines, seams, and veins of coal, and veins or beds of ironstone, and other ores and minerals situate, lying, and being within the said manor; and that the said late King, and all those whose estate he then had, of and in the manor, and of and in the said collieries, mines, seams, and veins of coal, and veins or beds of ironstone, and other ores and minerals, for the time being, and his and their tenants and farmers, occupiers of the said collieries, mines, seams, and veins of coal, and veins or beds of ironstone, and other ores and minerals; and all those persons respectively to whom, from time to time, he or they had granted licence and liberty to work, search for, win, get, and bring up the said collieries, mines, seams, and veins of coal, and veins or beds of ironstone, and other ores and minerals, from time whereof, &c., had been used and accustomed of right, and of right ought to have been used and accustomed, and they still of right ought to be used and accustomed, as often as it might be necessary for the purpose of effectually draining, getting, winning, and working the said collieries, &c., to enter, and of right still ought, as often as it may be necessary for the purpose aforesaid, to enter into and upon any lands parcel of the said manor, and within the townships aforesaid, and then and there for the purpose aforesaid with shovels, &c. to dig up, turn up, and subvert the earth and soil of, and dig, make, and sink mines, pits, shafts, and holes in and upon the said lands; and out of the said mines, pits, shafts, and holes so dug, made, and sunk as aforesaid, and out of

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other mines, pits, shafts, and holes theretofore dug, made, and sunk in and upon the said lands, to raise, dig, and get the coals, ironstone, ore, and other minerals there found, and the same when so raised, dug, and got from and out of the said mines, pits, shafts, and holes, to seize, take, and carry away, and to convert to his or their own use, doing no more than necessary for that purpose. * * That the said late King being so seised, before the several times when, &c., to wit, on the 18th of *April* 1807, by His certain indenture, sealed with His seal of His duchy of *Lancaster*, and then made between Himself, of the one part, and the right honourable *Granville Levison Gower*, now Earl *Granville*, of the other part, and in due manner enrolled of record in the court of Chancery of the said late King, at *Westminster*, did grant and demise unto the said *G. L. Gower*, his executors, &c., all those collieries or mines, veins or seams of coal called, &c., situate and being within the several liberties, townships, or villages of *Shelton* and *Handley*, within the manor of *Newcastle-under-Lyme*, parcel of the possessions of His said Majesty's duchy of *Lancaster*, in the county of *Stafford*, and also other mines and veins, and seams of coal belonging to His said Majesty within the liberties, townships, or villages aforesaid, as well as those which had been then already discovered open and worked, as those which should thereafter be found opened and worked by virtue of the said indenture, together with full power, licence, liberty, and authority to and for the said *G. L. Gower*, his executors, &c., from time to time, during the continuance of that said demise, at his and their will and pleasure to dig, search for, discover, win, and get the mines, veins, and seams, of coal within the said liberties, townships, and villages, and to take, carry away, and convert the same to his and their own use; and, for the more effectually draining, getting, winning, and working the said mines, veins,

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and seams of coal, and carrying away and converting the same; to dig and sink pits, erect engines, carry up soughs and drains, and to get sand, and get and burn clay into bricks and tiles, and to make and use such cuts, watercourses, sluices, roads, and to do all other acts, matters, and things which should be necessary or expedient for the several purposes aforesaid, within any part or parts of the said liberties, townships, or villages, in as large, ample, and beneficial a manner as the said late King might or could have done in case the said indenture had not been made: Habendum, to the said *G. L. Gower*, his executors &c. from the 25th of *March* then last past for the term of forty-one years. And His said late Majesty did also in and by the said indenture, grant and demise unto the said *G. L. Gower*, all those veins or beds of ironstone and other ores and minerals found or to be found within the said liberties, townships, or villages, and with full licence, power, and authority to and for the said *G. L. Gower*, his executors &c., and his and their agents, servants, and workmen during the said term, to work, get, and raise the same to and for his and their sole use; and for the more effectually draining, getting, winning, and working the said veins or beds of ironstone and other ores and minerals, and carrying away and converting the same, to dig and sink pits, erect engines, carry up soughs and drains, to get sand, and to get and burn clay into bricks and tiles, and to make and use such cuts, watercourses, sluices, and roads, and to do all other acts, matters, and things, which should be necessary and expedient for the several purposes aforesaid within any part or parts of the said liberties, townships, or villages, in as large, ample, and beneficial a manner as the said late King, his heirs &c. might or could have done in case the said indenture had been made without any molestation or disturbance

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by the said late King, his heirs &c., or his or their officers: Habendum, to the said *G. L. Gower*, his executors &c. from the 25th of *March* next preceding, for and during the term above mentioned. As by the said indenture (an exemplification of the inrolment whereof, sealed under the said late King's seal of the Duchy of *Lancaster*, the date whereof is at *Westminster*, the said 18th of *April* 1807, the defendants brought there into court) more fully appeared. By virtue of which several demises the said *G. L. Gower* afterwards, to wit, on &c. entered into and upon the demised tenements, collieries, mines, veins and seams of coal, and veins or beds of ironstone and other ores and minerals, and became and was possessed thereof, together with the powers, liberties, privileges, licence, and authority aforesaid, for the said term, and continued so possessed thereof and the occupier thereof until the several times when &c. That before and at the several times when &c. there were and still are divers collieries, mines, seams and veins of coal, and divers quantities of coals, ironstone, ores, and other mines and minerals of great value within and under the said closes in which &c., and within the township of *Shelton* and *Handley* aforesaid, and that it was then and there necessary for the purpose of effectually getting, winning, and working the said collieries, mines, seams and veins of coal, ores, and minerals, to enter the said closes in which &c., and there to dig up, turn up, and subvert the earth and soil of the said closes, and to dig, make and sink divers mines, pits, shafts, and holes therein, and to win and work the same; and also such mines, pits, shafts, and holes theretofore dug, made, and sunk in and upon the same as aforesaid, wherefore the defendants—as the bailiffs and servants of the said Earl *Granville*, and by his command, and because the said coals, ores, and minerals could not otherwise be gotten, won, or worked,—at the several times when

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&c., entered into and upon the said closes in which &c. for the purposes last aforesaid, and did then and there, for the said purposes, with shovels dig up, turn up &c. said closes, and did then and there, for the said purposes, begin to dig, make, and sink the said mines, pits, shafts, and holes therein, and to win, work, and get and raise, and dig from such mines, pits, shafts, and holes, and from the said other mines, pits, shafts, and holes theretofore, dug, made, and sunk in and upon the said closes respectively the said coals, ore, and other minerals above mentioned, doing no more than necessary for that purpose * * *; and because the said culm, earth, soil, and stones in the declaration mentioned, at the several times when &c. were intermixed with the said coals, ore, and other minerals, and the same were then embedded therein, so that without raising, digging, and getting a portion of the said culm, earth, soil, and stones, it was impossible to win, work, and get, raise, and dig the said coals, ore, and other minerals, the defendants, at the said several times when &c., in order to win, work, and get, raise and dig the said coals, ore, and other minerals, and in winning, working, and getting, raising, and digging the same, did necessarily and unavoidably, along with the same, raise, dig, and get a little of the said culm, earth, soil, and stones of the said closes, and then and there left the same in and upon the said closes for the use of the plaintiff, doing no more than necessary for the purpose aforesaid; and in so doing, the defendants, at the several times when &c. necessarily and unavoidably committed the said several trespasses in the introductory part of that plea mentioned, doing no unnecessary damage to the plaintiff on the occasions aforesaid; which are the same &c. Verification.

The fourth plea was similar to the third, except that at * * *ante*, 906., the following condition was inserted: "and making and paying to the occupier or occupiers,

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for the time being, of such lands, a reasonable compensation or satisfaction when demanded for the user thereof, and for all damage occasioned or to be occasioned to the surface of the said lands thereby;" and at * * * *antè*, 909., the following averment: "and being ready and willing, and the defendants then and there were and still are ready and willing, as the bailiffs and servants of the said earl, and the said earl then and there was, and still is, ready and willing, to make and pay to the plaintiff, the occupier for the time being of the said closes in which &c., a reasonable compensation and satisfaction *when demanded*, for the user thereof, and for all damage occasioned to the surface of the said closes, by so doing."

Fifth plea,—as to the trespasses in the introductory part of the third plea mentioned, that the several closes in which &c. were situate in the townships of *Shelton* and *Handley*, in the parish and county aforesaid, or one of them, and at the several times when &c., and from time whereof the memory of man was not to the contrary, and thence hitherto have been, and still are, within and parcel of the said manor of *Newcastle-under-Lyme;* and that the said townships of *Shelton* and *Handley* during all the time aforesaid have been and still are within the said manor, and that from a period long before and at the several times when &c. the said earl was and thence continually, to wit, hitherto has been, and still is, in the lawful possession, and the occupier, of certain collieries, mines, veins or seams of coal, and veins or beds of ironstone, and other ores and minerals, situate and being within and under the several townships above mentioned. That the said earl, and all those who, from time to time, have been before him the successive occupiers thereof, have actually, as of right, held, used, and enjoyed, without interruption, in respect of such occupation, for the full period of *forty years* next preceding the commencement of this suit, and of right

ought to have so holden, used, and enjoyed, and the said earl, being such occupier as aforesaid, at the said several times when &c., of right held, used, and enjoyed, and still of right ought to hold, use, and enjoy, the power, liberty, privilege, benefit, and easement, as often as it might be necessary for the purpose of effectually getting, winning, and working the said collieries, mines, veins, and seams of coal, ironstone, and other ores and minerals, to enter into and upon any lands part or parcel of the said manor or lordship, and within the townships aforesaid, or either of them, and then and there, for the purpose aforesaid, with shovels, &c., to dig up, &c., and to dig, make, and sink mines, pits, shafts, and holes of great breadth and depth in and upon the said lands, and out of the said mines, pits, shafts, and holes so dug, made, and sunk as aforesaid, and out of other mines, pits, shafts, and holes theretofore dug, made, and sunk in and upon the said lands, to raise, dig, and get the coals, ironstone, ore, and other minerals there found, and the same, when so raised, dug, and gotten from and out of the said mines, pits, shafts, and holes, to seize, take, and carry away, and to convert to his or their own use, doing no more than necessary for that purpose * *: that before and at the said several times when, &c., there were, and are, divers collieries, mines, seams, and veins of coal, and divers quantities of coals, ironstone, ores, and other mines and minerals of great value within the townships of *Shelton* and *Handley* aforesaid, and that it was then and there necessary, for the purpose of effectually getting, winning, and working the said collieries, mines, veins, and seams of coal, ores, and minerals, to enter the closes in which &c., and there to dig up &c., and to dig, make, and sink these mines, pits, shafts, and holes therein, and to use and work the same, and also such mines, pits, shafts, and holes theretofore dug, made, and sunk in

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and upon the same as aforesaid; wherefore the defendants, as the bailiffs and servants of the said earl, and by his command, and because the said coals, ores, and minerals could not otherwise be gotten, won, and worked at the several times when, &c., entered into and upon the closes in which, &c., for the purposes last aforesaid, and did, for the purposes last aforesaid, with shovels &c., dig up &c., and did for the said purposes begin to dig, make, and sink the said mines, pits, shafts, and holes therein, and to win, work, and get and raise and dig from such mines, pits, shafts, and holes, and from the said other mines, pits, shafts, and holes theretofore dug, made, and sunk in and upon the said closes respectively the said coals, ore, and other minerals, doing no more than necessary for that purpose **; and because the said culm, earth, soil, and stones at the several times when, &c., were intermixed with the said coals, ore, and other minerals, and the same were then embedded therein, so that without raising, digging, and getting a portion of the said culm, earth, soil, and stones, it was impossible to win, work, and get, raise, and dig the said coals, ore, and other minerals, the defendants, at the several times when &c., in order to win, work, and get, raise, and dig the said coals, ore, and other minerals, and in winning, working, and getting, raising, and digging the same, did, necessarily and unavoidably, along with the same, raise and dig and get a little of the said culm, &c., and there left the same in and upon the said closes, for the use of the plaintiff, doing no more than necessary for the purpose aforesaid; and in so doing the defendants, at the several times when &c., necessarily and unavoidably, for the purposes aforesaid, committed the said several trespasses above in that plea in that behalf mentioned, doing no unnecessary damage to the plaintiff on the occasion aforesaid, and as they lawfully might for the cause aforesaid; which are the same &c. Verification.

The sixth plea was similar to the fifth, inserting at * * the condition, and at *** the averment, contained and added in the fourth plea, *antè*, 909.

The seventh plea was similar to the fifth, and the eighth the same as the sixth, except in alleging the exercise of the right for twenty instead of forty years next preceding the commencement of the action.

Ninth plea—as to the several trespasses in the introductory part of the third plea mentioned—that the closes in which, &c., are situate in the townships of *Shelton* and *Handley* aforesaid, or one of them, and at the several times when, &c., were and from time whereof, &c., and thence hitherto have been and are within, and parcel of, the said manor of *Newcastle-under-Lyme*; and that the said townships of *Shelton* and *Handley*, during all the time aforesaid, have been and still are within the said manor; and that from a period long before, and at the several times when, &c., to wit, on the 31st of *January* 1832, His late Majesty King *William* the Fourth was seised in his demesne as of fee in right of, &c., of and in the said manor of *Newcastle-under-Lyme*, and of and in the collieries, mines, veins, and seams of coal, and veins or beds of ironstone, and other ores and minerals, situate and being within the manor aforesaid, together with the right and liberty by himself or his servants of entering, as of right, into and upon any lands, being part and parcel of the said manor, and within the townships aforesaid, or either of them, as often as it might be necessary, for the purpose of working the said collieries, mines, seams, and veins of coal, and veins or beds of ironstone, and other ores and minerals, and then and there, for the purposes aforesaid, with shovels, &c., to dig up, &c., and dig, make, and sink mines, pits, shafts, and holes, in and upon the said lands, and out of the said mines, pits, shafts, and holes so dug, made, and sunk as aforesaid, and out of other

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mines, pits, shafts, and holes theretofore dug, made, and sunk in and upon the said lands, to raise, dig, and get the coals, ore, and other minerals there found, and the same when so raised, dug, and gotten from and out of the said mines, pits, shafts, and holes, to seize, take, and carry away, and to convert to his or their own use, doing no more than necessary for that purpose, and making and paying to the tenants or occupiers, for the time being, of such lands, a reasonable compensation and satisfaction, *when demanded*, for the user thereof, and for all damages occasioned or to be occasioned to the surface of the said lands thereby; that before and at the several times when, &c., the late King *William* the Fourth was working, winning, and getting the said mines, coals, ores and minerals, within and under the said closes, in which, &c., and in the township of *Shelton* and *Handley* aforesaid, or one of them; and that it was then and there necessary, for the purpose of effectually getting, winning, and working the said collieries, veins and seams of coal, ores and minerals, to enter the closes in which, &c., for the purpose aforesaid, and in manner thereinbefore mentioned; wherefore the defendants, as the bailiffs and servants of His said late Majesty, and by his command, and because the said coals, ore, and other minerals could not be otherwise gotten, won, or worked at the several times, when, &c., in the declaration mentioned, to wit, on the said 1st of *January* 1834, and on the said other days and times in the declaration mentioned, entered into and upon the said closes, in which, &c., for the purposes last aforesaid, and did then and there for the said purposes, with shovels, &c., dig up, &c., and did for the said purposes begin to dig, make, and sink the said mines, pits, shafts, and holes therein, and to win, work, and get, and raise and dig from such mines, pits, shafts, and holes, and from the said other mines, pits, shafts, and holes theretofore,

dug, made, and sunk in and upon the said several closes in which, &c., respectively, the said coals, ores, and other minerals above mentioned, doing no more than necessary for that purpose; and the defendants, as such bailiffs and servants as aforesaid, then and there were, and still are ready and willing, and His said late Majesty, during all the time aforesaid, was ready and willing, to pay to the plaintiff, the occupier, for the time being, of the closes in which, &c., a reasonable compensation and satisfaction, *when demanded*, for the user thereof, and for all damage occasioned or to be occasioned to the surface of the said closes by so doing; and because the said culm, earth, soil, and stones at the several times when, &c., were intermixed with the said coals, ore, and other minerals, and the same were then embedded therein, so that without raising, digging, and getting a portion of the said culm, earth, soil, and stones, it was impossible to win, work, and get and raise, and dig the said coals, ore, and other minerals; the defendants, at the several times when, &c., in order to win, work, and get and raise, and dig the said coals, ore, and other minerals, and in winning, working, and getting, raising, and digging the same, did necessarily and unavoidably, along with the same, raise, dig, and get a little of the said culm, earth, soil, and stones of the said closes, and left the same in and upon the said closes for the use of the plaintiff, doing no more than was necessary for the purpose aforesaid; and, in so doing, the defendants, at the several times when, &c., necessarily and unavoidably, for the purpose aforesaid, committed the several trespasses in the introductory part of the said third plea mentioned, doing no unnecessary damage to the plaintiff on the occasions aforesaid; as they lawfully might for the cause aforesaid; which are the same, &c. Verification.

Tenth plea, a justification under a similar right in

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Queen *Victoria*, as to the trespasses alleged to be committed during her reign.

Eleventh plea, "as to the trespasses in the declaration mentioned," not guilty within six years.

Twelfth plea, as to the breaking and entering the closes in which, &c. and digging up, &c.; and digging, making, and sinking mines, pits, shafts and holes therein, and raising, digging, and getting the said coals, culm, earth, soil, stones, ore, and other minerals, and treading down, &c.: that the plaintiff was not at the several times when, &c. possessed of the closes in which, &c., or of any part thereof, or of the earth and soil of the said closes in which, &c., or any part thereof, or of the said coals, culm, earth, soil, stones, ore, or other minerals, or of any part thereof; concluding to the country.

The plaintiff joined issue upon the first, the second, and the twelfth pleas.

To the third plea the plaintiff replied, traversing the prescription, and concluding to the country.

The replication to the fourth plea stated, that after the breaking and entering the said closes in which, &c. on the day and year first above mentioned, and during the continuance of the trespasses in the introductory part of the third plea mentioned, to wit, on the 1st of *June* 1839, the plaintiff gave notice to the defendants and to the said earl, that he the plaintiff claimed a reasonable compensation and satisfaction for the use of the closes in which, &c., and for the damage occasioned and to be occasioned to the surface of the said closes, by in and about the getting, winning, and working the said collieries, mines, seams, and veins of coal, ores and minerals; and then required the said earl to make and pay to him the plaintiff such reasonable compensation and satisfaction as aforesaid; but neither the said earl nor the defendants, nor any other person, did or would then, or at

any other time, make such reasonable, or any compensation or satisfaction to the plaintiff, but altogether refused so to do; *without this*, that the defendants were ready or willing as the bailiffs and servants of the said earl, or that the said earl was ready or willing, to make or pay to the plaintiff as occupier of the said closes in which, &c., a reasonable compensation and satisfaction when demanded for the user thereof, and for all damage occasioned or to be occasioned to the surface of the said closes by the getting, winning, and working of the said mines, seams, and veins of coal, ores and minerals, *modo et formâ*; concluding to the country. (*a*)

The replications to the fifth and seventh pleas traversed the prescription, alleged in those pleas, concluding to the country.

The replications to the sixth and eighth pleas were the same as that to the fourth plea.

The replication to the ninth plea stated that the defendants did not, as the bailiffs or servants of King *William* the Fourth, or by his command, enter into and upon the said closes in which, &c. or commit the said other trespasses in the introductory part of the ninth plea mentioned, *modo et formâ*; concluding to the country.

The replication to the tenth plea, traversed the command by Queen *Victoria*.

To the eleventh plea, the plaintiff replied that the defendants were guilty within six years, concluding to the country.

The defendants added the *similiter* to the several replications.

(*a*) Formerly, when part only of the plea was traversed, the replication concluded with a prayer of judgment; but as the defendant can rejoin nothing but what he has said before, this useless lengthening of the record is now more commonly omitted. And see 1 *Wms. Saund.* 103. *b. c.*

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Talfourd Serjt. (with whom were *Channell* and *Wrangham* Serjts.), conducted the case on the part of the plaintiff. (*a*) The action was brought by the plaintiff, a copyholder of the manor of *Newcastle-under-Lyme*, to recover compensation for various trespasses alleged to have been committed on the plaintiff's closes. The defendant *Forrester* was the mine-agent, and the other defendant, the ground-bailiff of Earl *Granville*, who was lessee under the Crown, of the mines and minerals within the manor. The right of Lord *Granville*, as such lessee, to enter and take the minerals on payment to the occupier of the land of a reasonable compensation for surface-damage, was admitted by the plaintiff's counsel; and the counsel for the defendants stating, that they had no intention to raise any question, or to offer any evidence as to the unqualified right set forth in the third, fifth, and seventh pleas, the only point for the jury was, whether a sufficient compensation for surface-damage had been tendered. On the part of the plaintiff several witnesses were called to speak to what would be a reasonable compensation for the damage done to his lands, and to shew that reasonable compensation had been demanded and refused.

The following letters were also offered in evidence.

The first was dated the 3d of *October* 1838, from the plaintiff to Mr. *Lowndes*, Lord *Granville*'s agent.

"Sir,—The trespass done by the Right Hon. Earl *Granville* at *Shelton* colliery upon the surface of my land, I require at the rate of 7*l.* per annum, which sum I consider far below the real value, and for each pittage 15*s.* per annum. And this I offer to you, to put an end to further disputes; but the above I offer *without prejudice*, in case it is not agreed to."

(*a*) The pleadings were opened by *Wrangham*, as the junior serjeant, according to the usual course in trials at bar.

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The reply, bearing date the next day, was as follows:—

"Sir,—The demand you make for the rent of your land, used by Lord *Granville* in his works, is so ridiculously high, that I have no hesitation in refusing to give it. The matter must therefore be decided by arbitration. Mr. *Bowers* will act for Lord *Granville*, and you will send the name of the person you appoint as your referee. The proper bond of arbitration shall be prepared."

It was objected, for the defendants, that as the plaintiff's letter being "*without prejudice*," could not be received in evidence *against* him, so neither could that letter, or the reply to it, be used as evidence on his behalf.

TINDAL C. J. There is nothing to take this case out of the general rule. It is of great importance that parties should be left unfettered by correspondence, which has been entered into upon the understanding that it is to be without prejudice. It would be a hard thing to allow the answer to an offer, which is stated to be without prejudice, to be received in evidence, because the same words are not adopted in such answer.

The rest of the court concurring, the letters were rejected.

The following letter, dated the 23d of *October* 1838, was tendered in evidence to shew a demand and refusal.

"Sir,—I find during my absence you sent the inclosed paper, which I return to you as not being a demand, to which, on the part of Lord *Granville*, I am authorised to submit. Mr. *Lowndes*, in reply to your last, informed you that he could not consent to pay what

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you demand, 7*l.* an acre and 15*s.* a pit. I have already given you an account of what I consider a fair price to be paid; and if that does not satisfy you, the question can be settled by arbitration."

This letter was also objected to, as referring to the proposition contained in the plaintiff's letter of the 3d of *October*.

TINDAL C. J. I do not think that the paper contained in this letter could have been the plaintiff's former propositon, as twenty days had elapsed at the time that this letter was written.

The defendants' counsel then objected, that as the letter referred to a paper enclosed, it was not admissible without the production of such paper. (*a*)

TINDAL C. J. I think that for the collateral and simple purpose of proving a demand, it is admissible. It is impossible to read this letter, without seeing that it is an acknowledgment that a demand had been made by the plaintiff of 7*l.* an acre and 15*s.* a pit.

The letter was accordingly received in evidence.

Sir *Thomas Wilde* Serjt. (with whom were *Bompas* Serjt., *Ellis*, the attorney-general of the Duchy of *Lancaster* (*b*), and *J. L. Adolphus*) for the defendants,

(*a*) *Vide Goss* v. *Quinton*, *antè*, 825.

(*b*) A question arising as to the right of *Ellis* as attorney-general of the duchy of *Lancaster*, to address the court, his patent of appointment was handed up to the bench and examined, whereupon the Lord Chief Justice stated that the court, on looking at the patent, were of opinion that the privileges it conferred were confined to the courts of the duchy.

Quære, whether supposing the letters patent had expressly purported to confer the right of audience in this court, such right would have been well conferred.

submitted, that as the right of the Crown and its lessee to enter the plaintiff's lands for the purpose of working the mines on the payment of a reasonable compensation was admitted, and as the damage could not be estimated until after such entry and working, an action of trespass could not be maintained. A refusal to pay damages would not make the parties trespassers; and there is no pretence for saying that they became trespassers *ab initio*, by reason of their disputing the amount of the compensation. In *Lister* v. *Lobley* (*a*), by a turnpike act, the trustees were authorised to enter upon, and take, certain lands, and to pull down certain houses, buildings, &c., "*making or tendering satisfaction*" to the owners or proprietors of all private lands, houses, buildings, &c. so taken "for any loss or damage they might sustain thereby." Trespass was brought against the defendants for taking lands &c. for the purposes of the act, and a verdict was entered for the plaintiff. Upon a motion for new trial, on the ground that trespass was not maintainable, it was contended by the defendants that the words "making or tendering satisfaction" did not require the trustees to make compensation before entering, as "it must often be impossible to ascertain before hand the damage that will be done;" whereupon Lord *Denman* C. J. said, "I do not see how the last observation can be answered. The amount of compensation cannot generally be ascertained till the work is done. The effect of the words in question is, that they shall not do it without being *liable* to make compensation." *Littledale* J. said, "There may be a damage done which was not intended. The lord of a manor often has a power reserved to him to enter lands and dig mines, making compensation; but in justifying under such a right, he need not plead that he made

(*a*) 7 *Ad. & E.* 124.

compensation before entering." And *Williams* J. said, "Words authorising trustees to enter lands and remove buildings, 'making or tendering compensation,' cannot render them trespassers *ab initio*, if they omit to make or tender it." (*a*)

This is not like the case of a party entering by licence or authority of law, where the committing of any excess renders him a trespasser *ab initio*. Here, as it is impossible at the time of entering to estimate the amount of damage, no tender can be made previously to making such entry.

With respect to the replications to the fourth, sixth, and eighth pleas, they allege a demand of a "*reasonable compensation and satisfaction;*" but the demand which has been proved is, of a certain specific sum. There has, therefore, been no such demand as is necessary to support the present action, supposing trespass to be maintainable; the custom being, to make such compensation on demand.

TINDAL C. J. There are issues upon the record which must go to the jury, even supposing your objections to be well founded.

The learned serjeant proceeded to address the jury, and called witnesses, and among others the agent of Earl *Granville*, who proved, that at a meeting which took place between the plaintiff and himself, an agreement was come to, that the compensation to be paid should be at the rate of 6*l.* 6*s.* an acre, and that he was about to make the plaintiff a tender of that amount, when he was prevented by the plaintiff suddenly leaving the room.

It was admitted, upon this evidence, that the defend-

(*a*) *Vide The Six Carpenters' case*, 8 *Co. Rep.* 146 *a.*

ants were entitled to a verdict on the issues joined upon the replications to the fourth, sixth, and eighth pleas, namely, those alleging the right to enter the land and take the minerals on payment of reasonable compensation to the occupier. A discussion took place as the entry of the verdict upon the other issues, when it was at length agreed that the jury should find for the defendants upon the issues joined upon the replications to the fourth, sixth, and eighth pleas, and that with respect to the remaining issues the verdict should be entered as the court should afterwards direct.

Sir *Thomas Wilde* Serjt., for the defendants, in the following *Trinity* term, obtained a rule nisi to enter the verdict as follows: — On the first and second issues, for the defendants, except as to the raising, getting, and digging the *earth, soil, and stones*, and seizing, taking, and carrying away and converting the same to their use, as in the declaration alleged; on the third, fourth, fifth, sixth, seventh, and eighth issues, for the defendants; on the ninth issue, for the defendants, as to so much of the trespasses as were committed before the death of *William* the Fourth, and for the plaintiff, as to the remainder. On the tenth issue, for the plaintiff, as to so much of the trespasses as were committed before the death of *William* the Fourth, and for the defendants, as to the remainder; on the eleventh issue, for the plaintiff; and on the twelfth, for the plaintiff, to the same extent as on the first issue. The learned serjeant cited *Gray*'s case. (*a*)

Talfourd Serjt., for the plaintiff, also obtained a rule nisi to enter the verdict for the plaintiff on all the issues except the fourth, sixth, and eighth, and for judgment

(*a*) 5 *Co. Rep.* 78 *b.*; *S. C. Cro. Eliz.* 405., *per nom. Gray* v. *Fletcher.*

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for the plaintiff *non obstante veredicto*, on the fourth, sixth, and eighth issues, and on any others that might be entered against the plaintiff,—on the ground that it appeared that the *locus in quo* was part of the manor of *Newcastle-under-Lyme*, and the right was claimed, not by *custom*, as it was submitted it ought to have been, but by *prescription*. [The second branch of the rule was, however, ultimately abandoned.]

Talfourd, *Channell*, and *Wrangham* Serjts., in *Michaelmas* term, were heard for the plaintiff on both rules. They referred to *Lovelace* v. *Reynolds* (*a*) and *Palmer* v. *Stone*. (*b*)

Sir *T. Wilde* and *Bompas* Serjts., for the defendants, relied on *Gray's* case, *The Six Carpenters'* case, *Harbin* v. *Green* (*c*), *Griffith* v. *Williams* (*d*), *Kinchin* v. *Knight* (*e*), and *Brook* v. *Willett* (*g*).

After some discussion, it was agreed between the counsel on both sides, that the verdict on the first, second, and twelfth issues, should be entered for the plaintiff, as to the *earth, soil, and stones*, and for the defendants, as to the minerals, and on the eleventh issue, for the plaintiff; leaving nothing for the decision of the court except the form in which the verdict upon the third issue was to be entered.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This case has been brought before us on a motion made by each party, that the court should direct

(*a*) *Cro. El.* 546. 563.
(*b*) 2 *Wils.* 96. 101.
(*c*) *Hob.* 189.
(*d*) *Sayer*, 56.
(*e*) 1 *W. Bla.* 49., 1 *Wils.* 253. And see *Palmer* v. *Stone*, 2 *Wils.* 96. 105.
(*g*) 2 *H. Bla.* 224.

in what mode the verdict of the jury upon a trial at bar, should be entered upon the several issues raised upon the record. In consequence, however, of the agreement between the learned counsel during the course of the argument as to the finding upon several of the issues, the only question that remains to be considered by us is, as to the mode of entering the verdict upon the issue raised on the third plea; for when the proper finding on that issue is ascertained, the verdict upon the fifth and seventh issues will follow the same course.

By the third plea the defendants justify under a prescription in the name of King *George* the Third, in right of the Duchy of *Lancaster*, to enter upon the lands in question for the purpose of getting coals, ironstone, ore, and other minerals, and to dig and open mines therein for that purpose, and to take and carry away the same, doing no more than is necessary for that purpose; and this prescription the plaintiff traverses in his replication, and issue is joined thereon. But by the fourth plea the defendants further justify under a prescription, in the same terms as the last, adding thereto this qualification or condition, viz. "making and paying to the tenant or occupier, for the time being, of such lands, a reasonable compensation and satisfaction, *when demanded*, for the user thereof, and for all damage occasioned, or to be occasioned, to the surface of the said lands, thereby." The plaintiff, in his replication, admits the prescription so last pleaded, and alleges a refusal on the part of the defendants, when the same was demanded, to pay a reasonable compensation for surface-damage; and issue being taken on this allegation, the verdict is found for the defendants.

As no evidence was given at the trial of any other prescription than that which was admitted by the pleadings, the defendants must be considered in the same situation, as if that conditional prescription, and that

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only, had been proved at the trial; and the question between the parties therefore is, whether evidence given of such qualified or conditional prescription would support the prescription stated in the third plea, omitting the qualification or condition.

On the part of the defendants it was argued, that the condition is a *condition subsequent* (*a*) only; that as it is impossible the damages can be ascertained, much less paid, until after the minerals are taken, and as it is even uncertain whether they will ever be demanded, it must be unnecessary for the defendants to shew this condition in their pleading; but that the same, and also the breach of it, ought to come from the other side.

On the part of the plaintiff it was insisted, that the prescription is one entire prescription, both in form and substance; and that it is a fatal variance if such prescription as this be pleaded as an absolute prescription without qualification or condition annexed to the same. And, upon consideration, we are of opinion that this objection on the part of the plaintiff ought to prevail.

That the performance or non-performance of this condition, must be altogether a matter subsequent in point of time to the exercise of the right claimed by the prescription is undoubtedly true; and the consequence is, that the defendants who set up the prescription, cannot be called upon to allege the performance of the condition; but that the breach of such condition must be shewn by the other party. And, to this effect, the case of *Lister* v. *Lobley* (*b*) is in point.

But we think the real question is, whether the prescription set out in the fourth plea, is one *entire* prescription, or whether it may be considered, virtually, as *two* prescriptions,—one, for the lord of the manor, to enter to take the minerals,—another, on the part of the land-

(*a*) *Vide antè*, Vol. I. 8. (*b*) 7 *Ad. & E.* 124.

owners, to demand reasonable compensation for the surface-damage. And it appears to us to be one entire prescription. If the right set up by the defendants in their fourth plea had been claimed under a grant by the tenants or a reservation by the lord, and the deed when produced had shewn the grant or reservation to be "that the lord should enter, paying a reasonable compensation," there could have been no doubt, as we conceive, but that a plea which omitted the condition, would, upon such evidence, be found against the party pleading it. And the rule of construction must be the same, whether the plea is founded upon a grant or upon an immemorial prescription, which pre-supposes a grant. And this construction agrees with the opinion of the court in *Gray*'s case (*a*), where the plaintiff entitled himself to have common of pasture in the place in which, &c.; and the jury found that he ought to have the same common, but that every copyholder had used to pay time out of mind for the same common, a hen and five eggs every year. For although the court held in that case, that on this verdict the plaintiff should have judgment "for the plaintiff need not shew more than makes for him, and is of his part," yet it is expressly said by the court, "that if the jury had found that the plaintiff should have common, *paying* so many hens and eggs, the issue had been found against him, because it is parcel of the custom." And in the case of *Lovelace* v. *Reynolds* (*b*) the court, referring to *Gray*'s case, which had been decided two years before, stated the ground of that decision to have been,

(*a*) 5 *Co. Rep.* 78. *b.*

(*b*) *Cro. El.* 546. 563. In Lord *Anderson*'s own report of this case, it is said that the court compared it to the case of a claim of common for *six cattle*, and proof of common for *six cattle levant and couchant*. He concludes with saying, that several of the justices of the Queen's Bench agreed to the decision of this court in *Lovelace*'s case. And see *Noy*'s report of the same case, *Noy*, 59, 60. and *Brigandine* v. *Westan* there cited.

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that in that case "there were two prescriptions, the one for the commoner, the other for the lord; and in the case then before them, where the prescription was for common generally, and the jury had found that the defendant had common there by prescription, prout, &c., "paying for it, every year, a penny to the plaintiff;" the court held the verdict to be against him who pleaded the prescription; for the prescription" they said, "is entire, and the payment of a penny annually, is parcel of the prescription; and it shall be intended to be as ancient as the common, and that they began at one time." And we think the question as to the finding of the prescription stated in the third plea, must be decided on the principles above laid down; and that there has been a failure of proof of that prescription, and that the verdict on the issue raised on the third plea, must therefore be entered for the plaintiff.

Judgment accordingly.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

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IN THE

COURT OF EXCHEQUER CHAMBER

UPON WRITS OF ERROR FROM

THE COURT OF COMMON PLEAS,

IN

Hilary Vacation,

IN THE

FIFTH YEAR OF THE REIGN OF VICTORIA.

DOE dem. BLESARD and Others *v.* SIMPSON and Others.

Feb. 15.

A testator being seised in fee of freehold lands, and also of copyholds, within the manor and forest of *K.* (which copyholds could not be entailed) after giving a freehold estate at *H.* "to the child or children which his wife should bear to him, their heirs and assigns," devised as follows: — "I give, devise, and bequeath to my son Dr. *J. S.*, his heirs and assigns for ever, all, &c. (and amongst other property the above copyholds); but if it shall happen my said son Dr. *J. S.* shall die *without leaving any child or children*, in that case I give, devise, and bequeath all the before mentioned estates, &c. unto my five children, viz., *Mary*, &c. (who were illegitimate), their

THIS was an action of ejectment, in which a special verdict was found, and judgment entered thereon for the defendants by consent, in order to bring under

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the consideration of a court of error the previous decision the court of Common Pleas in the case of *Doe d. Simpson* v. *Simpson* (*a*).

The special verdict found as follows: —

John Simpson of *Knaresborough*, in the county of *York*, surgeon, being seised, in his demesne as of fee, of certain freehold hereditaments in the county of *York*, and being also seised in fee, according to the custom of the *manor* of *Knaresborough*, of parcel of the tenements and premises in the declaration mentioned, consisting of two copyhold houses and gardens within, and parcel of the said manor of *Knaresborough*, on or about the 5th of *May* 1803, at a court holden for the said manor, duly surrendered the same to the use of his will, according to the custom of the said manor in that behalf; and being also seised in fee according to the custom of the *forest* of *Knaresborough*, of the residue of the tenements and premises in the declaration mentioned, which were within, and parcel of, the said forest of *Knaresborough*,

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heirs and assigns for ever, to be equally divided amongst them, share and share alike; and if any of my said five children should die before they come of age without *issue*, such share of him, her, or them so dying shall go equally amongst the survivors. My will also is, and I hereby order and direct that if my present wife *E.* should leave no issue to inherit the freehold estate at *H.*, that all the said estate at *H.* shall be subject to the same mode of distribution amongst my aforesaid five children as all the other property above mentioned given and bequeathed to my said son Dr. *J. S.* in case he die without *issue*."

Held, that if the lands had been freehold, Dr. *J. S.* would, under the foregoing devise, have taken an estate-tail, with remainder over to the testator's five natural children, as the words "child or children" were used in the sense of "issue" generally; but that the lands being copyhold, and not being capable of being entailed, Dr. *J. S.* took a fee-simple conditional, on which no remainder could be limited.

Held, also, that the lands being copyhold, which were not capable of being entailed, afforded no ground for construing the devise to the five natural children to be an executory devise to take effect in the event of Dr. *J. S.* dying without any child *living at his decease*.

(*a*) 4 *New Cases*, 333.

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on or about the 5th of *May* 1803, at a court holden for the said forest, duly surrendered the same to the use of his will according to the custom of the said forest in that behalf. Having so surrendered the same tenements and premises respectively, the said *John Simpson* duly made and executed his last will and testament in writing, bearing date the 12th of *December* 1803; by which will, duly executed and attested as by law required for the passing of real estates, after bequeathing the interest of 2600*l.* to his wife, *Elizabeth*, in lieu of dower, for her life, and the principal, after her death, to her children by him or any after-taken husband, absolutely, and after also devising a freehold estate at *Hampsthwaite*, then in the occupation of *Hannah Simpson*, to the child or children which his said wife, *Elizabeth*, should bear to him, their heirs and assigns, the said testator, *John Simpson*, gave, devised, and bequeathed (among other property) the said tenements and premises in the declaration mentioned, in the words following: —

"Secondly, I give, devise, and bequeath to my son, Dr. *John Simpson*, his heirs and assigns for ever, all my dwelling-house in which I now live, with the stable and gardens, pew in the church, and all other the appurtenances belonging to the same; also the house in *Knaresborough*, wherein *John Gibson* now dwells; also my freehold close, called *Spittal Croft*, near the *Low Bridge*; also my estates in the hamlet of *Pannal*, occupied by *Abraham* and *Solomon Morrell*; also all my estates in the hamlet of *Hampsthwaite*, now in the possession of *J. Wardman*, *J. Dodsworth*, *W. Brumley*, and *S. Shephard*; also my estates in the hamlet of *Felliscliffe*, now in the occupation of *W. Shephard*, *J. Robinson*, *J. Smith*, their under-tenants, or any other person or persons whatsoever; also all my estates in the hamlet

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of *Birstwith*, occupied by the said *J. Smith*; also my estates in the hamlet of *Timble* and *Fewston*, situate at *Spinksburn*, *Wideray Lane*, and *Timble*, now occupied by Dr. *Turner*, *J. Smith*, and *S. Ward*, with all their hereditaments, rights, members, and appurtenances to each respective estate belonging, or in any wise appertaining. But if it shall happen my said son, Dr. *John Simpson*, shall die *without leaving any child or children*, in that case, I give, devise, and bequeath all the before mentioned estates, lands, grounds, dwelling-houses, tenements, and hereditaments, with all their respective rights and appurtenances whatsoever, and wheresoever, herein said to be given, devised, or bequeathed to my said son, Dr. *John Simpson*, his heirs or assigns for ever unto my five children, viz., *Mary*, the wife of *John Blesard*, *Thomas*, *Frances-Katharine*, *Dorothy-Ann*, and *Dorinda*, their heirs and assigns for ever, to be equally divided amongst them share and share alike: And if any of my said five children shall die before they come of age without *issue*, such share of him, her, or them so dying shall go equally amongst the survivors. My will also is, and I hereby order and direct, that if my present wife, *Elizabeth*, shall leave no *issue* to inherit the freehold estate at *Hampsthwaite*, all the said estate in the possession of *Hannah Simpson*, shall be subject to the same mode of distribution amongst my aforesaid five children, viz., *Mary*, the wife of *John Blesard*, *Thomas*, *Frances-Katharine*, *Dorothy-Ann*, and *Dorinda*, as all the other property above mentioned given, and bequeathed to my said son, Dr. *John Simpson*, in case he die without issue."

The testator, *John Simpson*, had been married three times. By his first wife he had one only child, viz., the said Dr. *John Simpson*, in his will named, who died a bachelor in the year 1825; by his second wife the testator had also one only child, viz., *William Simpson*,

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who married Miss *Howgate*, and who died in the lifetime of the said Dr. *John Simpson*, leaving issue, viz., the defendants, *John Simpson* and *Mary*, who married *John Rothery*, since deceased, and is now the wife of the defendant, *George Gibbon*; by his third wife the testator, *John Simpson*, had not any issue; but he had seven other children who lived with and were maintained and educated by him, and bore his name, and were in other respects treated as his other children, but who were, all seven, illegitimate, viz., the said *Mary*, the wife of *John Blesard*, *Thomas*, *Frances-Katharine*, *Dorothy-Ann*, and *Dorinda* in his said will named, and two other children of whom *Hannah*, in his said will named, was one.

Frances-Katharine, on the 17th of *June* 1813, married *C. Earnshaw*, and died on the 29th of *June* 1824, in the lifetime of Dr. *John Simpson*, leaving an only son and customary heir-at-law, viz. *E. Earnshaw*, one of the lessors of the plaintiff, who was born on the 3d of *August* 1815, and had therefore long since attained the age of twenty-one years.

Dorothy-Ann, in the will named, on the 14th of *September* 1818, married *T. Castledge*, one of the lessors of the plaintiff, and in her lifetime, and after she had attained the age of twenty-one years, passed surrenders, according to the customs of the said manor and forest, of her interest in the said tenements and premises aforesaid, and in the declaration mentioned, to the use of her will; and by her will, duly executed and attested for the passing of real estates, she devised her said interest in the tenements and premises aforesaid, to her husband the said *T. Castledge* and his heirs, and on the 30th of *June* 1824 departed this life, leaving her said husband the said *T. Castledge*, her surviving.

John Blesard, in the will named, died on the 17th of *June* 1826, and the said *Thomas Simpson* and *Mary Blesard*,

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the customary tenants; which customs were inrolled in the court of the said forest of *Knaresborough* upon the 26th of *February* 1578, the fourteenth of which customs is, as follows:—"Also that every customary tenant within the said forest of *Knaresborough*, may surrender his customary lands into the hands of the lord by the head steward, learned steward, clerk of the court, grave (*a*) or bedel, of the said forest of *Knaresborough*, being nominated, known, and appointed, and, in peril of death, to two tenants of the same tenure, without the grave or bedel, to the use of any person or persons for term of years, for term of life, or in fee-simple, and *not in fee-tail.*" The eighteenth custom is, as follows:—"Also that every customary tenant may make a surrender to any person or persons of his customary lands after his death, and his wife's death or either of them; by force whereof he and she shall hold the land for term of his and her life; and he to whom the surrender is made, shall have but one reversion after their deaths, and shall pay for his fine as for one reversion; and the wife to pay one fine, as tenant for term of life; and one heriot to be paid of the goods of him that maketh the surrender."

At courts held for the said manor and forest of *Knaresborough* respectively on the 14th of *October* 1835, the defendant *John Simpson* was admitted tenant to two thirds of the tenements and premises aforesaid in the declaration mentioned, as devisee under the will of the said Dr. *John Simpson*, and the defendant *Mary Gibbon*, at the same courts, was admitted tenant to the remaining third of the same tenements and premises, as devisee under the last mentioned will.

The defendant *John Simpson* is heir-at-law of the first named testator *John Simpson* of *Knaresborough*, surgeon.

The questions to be argued are.—First, what estate in the premises Dr. *John Simpson* took under the will of

(*a*) Or *reve*, formerly *gerefa*.

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the testator *John Simpson* of *Knaresborough*, surgeon. Secondly, what estate in the premises *Mary* the wife of *John Blesard*, *Thomas Simpson*, *Frances-Katharine Simpson*, *Dorothy-Ann Simpson*, and *Dorinda Simpson* took under the said will on the death of Dr. *John Simpson* without issue. Thirdly, whether, notwithstanding such will, the premises in question, on the death of Dr. *John Simpson* without issue, descended on the right heirs of the said *John Simpson* of *Knaresborough*, surgeon.

The case was argued on the 6th of *December* 1841, before Lord *Denman* C. J., Lord *Abinger* C. B., *Patteson* J., *Alderson* B., *Williams* J., *Coleridge* J., and *Rolfe* B.

Cresswell for the plaintiffs in error. Under the will of *John Simpson*, his son Dr. *John Simpson* took a fee-simple, with an executory devise over to the testator's five natural children, in the event of Dr. *John Simpson* dying without leaving any child or children living at his decease. It is submitted that the words "child or children" are used in their primary sense; and even if they are to be construed in the larger sense of issue, their meaning must be restricted to issue living at Dr. *John Simpson*'s death. The testator, in several parts of his will, uses "issue" to denote children; but he no where employs the word "children" as designating issue. For instance, in the clause following that which is under the consideration of the court, namely, "and if any of my said five children shall die before they come of age without *issue*, such share of him, her, or them so dying shall go equally among the survivors," the testator manifestly uses "issue" in the sense of children. So also, when he directs that his estate at *Hampsthwaite*, in the case of his wife leaving no issue, "shall be subject to the same distribution among my aforesaid five children, viz. *Mary* &c., as all the other property above given and bequeathed to

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my said son Dr. *John Simpson*, in case he die without *issue*." [Lord *Abinger* C. B. By the construction you contend for, grandchildren would be excluded.] Yes. There are numerous cases in which the word "issue" has received a limited construction in order to give effect to the intention of the testator. In *Roe d. Cooper* v. *Collis* (*a*), it is said by Lord *Kenyon*, that "in a will 'issue,' is either a word of purchase or of limitation, as will best answer the intention of the devisor, though, in the case of a deed, it is universally taken as a word of purchase." [*Alderson* B. "Issue" is used in both senses in the statute *de donis* 13 *Edw.* 1. *st.* 1. *c.* 1.(*b*)] In *Stone* v. *Maule* (*c*), there was a bequest of personalty to *A.* for his own use, and in case he should die in the testator's lifetime or afterwards without having any child or children then over. *A.* survived the testator, but died without ever having had a child; and it was held that the gift over took effect. In *Goodright d. Docking* v. *Dunham* (*d*), the devise was in these terms: "I give my messuage &c. to my son *J. L.* for his life, and after his death unto all and every his *children* equally and to their heirs; and in case he dies without *issue*, I give the said premises unto my said two daughters and their heirs, equally to be divided between them." Lord *Mansfield* said, "The words 'and in case he dies without *issue*,' being tacked to the preceding clause, must mean the same thing as 'and in case he dies without *children*.'" *The King* v. *The Marquess of Stafford* (*e*) is also a strong case to shew that the word "issue" is construed to mean children, wherever that construction effectuates the intention of the testator. Here, if the words "child or children"

(*a*) 4 *T. R.* 294.
(*b*) The statute speaks of "*proles*" and of "*exitus*," both words being rendered "issue" by the translator.
(*c*) 2 *Sim.* 490.
(*d*) 1 *Dougl.* 264.
(*e*) 7 *East*, 521.

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are construed in their primary sense, supposing the property to be freehold, Dr. *John Simpson* would take a fee; for then there would be nothing to limit the words "his heirs and assigns for ever." And if that be so, the devise over on his dying "without leaving any child or children" would be a good executory devise. Then, the property being copyhold, why should not the same estates be taken? In *Doe d. Barnfield* v. *Wetton* (*a*), the testator devised "to *S. S.*, her heirs and assigns for ever, but if she should happen to die leaving no child or children lawful issue of her body living at the time of her death, then to *T. B.* and his heirs." It was held, that the devise in fee to *S. S.* was not restrained, by the subsequent words, to an estate tail, and that the devise over to *T. B.* was a good executory devise. [Lord *Abinger*. There, the words "living at the time of her death," put the matter beyond controversy.]

Supposing, however, the court should think that the words, "without leaving any child or children," are to be read "without leaving any issue," it is submitted that the period fixed, is the death of the first taker; and if so, then the devise over is a good executory devise. The twenty-ninth section of the 7 *W.* 4. and 1 *Vict.* *c.* 26. (*b*), was passed to remove the difficulty which

(*a*) 2 *B.* & *P.* 324.

(*b*) Which enacts, "that in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will by reason of such person having a prior estate-tail, or of a preceding gift, being,—without any implication arising from such words,—a limitation of an estate-tail to such person or issue or otherwise: provided that this act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age

ever; and provided, that in case she should happen to die and leave no *child* or *children*, then he devised unto his niece *B.* his freehold lands called *W.*, to her and her heirs for ever, paying 1000*l.* unto the executor or executors of his said niece *H.*, or to such person as she by her last will and testament should direct. It was held, that *H.* took an estate in fee, subject to an executory devise over on her leaving no issue *at her death.* Here, the testator evidently contemplates, that the period shall arrive in the lifetime of his five children, and that some of them will die under twenty-one without leaving children; which shews that the period fixed for the property going over, is the death of Dr. *John Simpson.* As the property in this case is copyhold not capable of being entailed, it is only reasonable to apply to it the rule laid down as to leaseholds in *Forth* v. *Chapman*, and in the earlier case of *Pinbury* v. *Elkin.* (*a*) In the former case, one possessed of a term, devised it to *A.* and *B.*; and if either of them died and left no issue of their respective bodies, then to *C.*; and this was held to be a good limitation to *C.* if *A.* or *B. left no issue at their death.* And in *Pinbury* v. *Elkin*, the testator made his wife executrix, and gave her all his goods and chattels; provided, that if she should die without issue by him, then *after her decease* 80*l.* should remain to his brother. Lord Chancellor *Parker* held, that the words imported a dying without issue at the death; for that a contrary construction would be repugnant to the words "then after" (*i. e. immediately* after) "her decease," which would be carrying the payment beyond the day; and would, his lordship observed, "be as absurd as to appoint the day of payment to be to-morrow if it shall rain this day twelvemonth."

(*a*) 1 *P. Wms.* 564.

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have no issue,' or '*if he die before he has any issue,*' or '*for want*' or '*in default of issue,*' unexplained by the context, whether applied to *real* or *personal* estate (notwithstanding the distinction taken between these two species of property in some of the early cases), are construed to import a *general indefinite failure of issue, i. e.* a failure of issue at *any* period; consequently following a preceding devise or bequest to the person whose issue is so referred to, they create in him an estate-tail in the realty, or an absolute interest in the personalty. This rule, however, admits of two exceptions; the first is, where the expression used is *leaving no issue;* with respect to which the established distinction is, that applied to *real* estate, it means indefinite failure of issue, but applied to *personal* estate (and real estate directed to be converted, is for this purpose regarded as personalty), it imports leaving issue *at the death.* In a devise, therefore, to *A.*, or to *A.* and his heirs, and if he shall die *and leave no issue*, or without leaving issue over, *A.* would take an estate-tail; but under a limitation of a term, or other personal estate in the same language, *A.* would take, not the absolute interest (as he would if the same construction prevailed), but an interest defeasible on his leaving no issue at his death. *Forth* v. *Chapman* (*a*) is the leading authority for this distinction; but it has been confirmed in a long train of subsequent decisions. Lord *Kenyon*, indeed, in *Porter* v. *Bradley* (*b*), questioned its soundness; but his dictum is inconsistent with a multitude of authorities, and has received the pointed reprobation of both Lord *Eldon* in *Crooke* v. *De Vandes* (*c*), and Sir *W. Grant* in *Elton* v. *Eason* (*d*), the former emphatically observing, that it went '*to shake settled rules to their very foundation.*' The other exception to be noticed is, where a testator *having no children*, de-

(*a*) 1 *P. Wms.* 663.
(*b*) 3 *T. R.* 146.
(*c*) 9 *Ves.* 197.
(*d*) 19 *Ves.* 73.

vises property in default or failure of issue *of himself;* in which case it is considered that the evident object of the testator is simply to make the devise contingent on the event of his leaving no issue surviving him, and not to a future indefinite failure of issue." There is nothing in this will to take it out of the ordinary rule. It is submitted that the words "issue," "children," and "heirs" must all have the same meaning, namely, heirs of the body. In *Barlow* v. *Salter* (*a*), it is said by Sir *W. Grant* M. R., "It appears in some of the early cases that the judges inclined to hold these words 'in case she dies without issue,' to mean without issue at the death of the person named; but ever since the case of *Beauclerk* v. *Dormer* (*b*), I think a different rule has prevailed; and it is now settled that unless there are expressions or circumstances from which it can be collected, that these words are used in a more confined sense, they are to have their legal signification, viz. death without issue generally. In the recent case of *Doe dem. Cadogan* v. *Ewart*, Lord *Denman*, in speaking of *Crooke* v. *De Vandes* and *Elton* v. *Eason*, says, "After these remarks of Lord *Eldon* and Sir *W. Grant*, we cannot consider the case of *Porter* v. *Bradley* to have overturned the case of *Forth* v. *Chapman;* and the more so, as since that case there have been two cases, of *Tenny dem. Agar* v. *Agar* (*c*), and *Dansey* v. *Griffiths* (*d*), in this court, directly the other way. And if the case of *Porter* v. *Bradley* be supportable at all, it can only be on the ground of the words *behind him* being introduced after the words *leaving no issue;* and which distinction is observed upon by Mr. Justice *Le Blanc* in his judgment in *Tenny dem. Agar* v. *Agar*. And with regard to *Roe dem. Sheers* v. *Jeffery*, that case, if supportable at all, can only be so on the

(*a*) 17 *Ves.* 479.
(*b*) 2 *Atk.* 308.
(*c*) 12 *East.* 253.
(*d*) 4 *M. & Sel.* 61.

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ground of the devise over being of life estates. In *Barlow* v. *Salter* (*a*) Sir *W. Grant* says, that in *Roe dem. Sheers* v. *Jeffery* the devise over was only of life estates, and, on that ground, Lord *Kenyon* compared it to *Pells* v. *Brown*." (*b*)

It is not necessary, therefore, to contend that *Porter* v. *Bradley* and *Roe d. Sheers* v. *Jeffery* are cases which cannot be supported; for, on the grounds suggested, they are clearly distinguishable from the present. *Doe d. Smith* v. *Webber* is a strong authority against the construction which it is sought by the other side to put on the words "child or children." That case turned on a legacy being charged on the estate upon its going over. In this case neither is there any charge nor is any life estate created. *The King* v. *The Marquess of Stafford* is not applicable to the present case, having been decided on a totally different principle. In *Doe dem. Bamfield* v. *Wetton*, as has already been observed, the words were "living at the time of her death." With respect to the point whether the words "child or children" make any difference, the devise to Dr. *John Simpson* shews the sense in which the testator used those words. In *Wild's* case (*c*) it was resolved for good law, that "if *A.* devise his lands to *B.* and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate-tail; for the intent of the devisor is manifest and certain that his children or issues should take; and as immediate devisees they cannot take, because they are not *in rerum naturâ*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate; therefore, there such words shall be taken as words of limitation, *scil.* as much as children or issues of his body; for every child or issue ought to be of the body." Suppose an estate had been given to Dr. *John*

(*a*) 17 *Ves.* 483.
(*b*) *Cro. Jac.* 590.
(*c*) 6 *Co. Rep.* 16 *b.*

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Simpson and his children, and if he should die without children then over, it is clear that he would have taken an estate-tail. It is said that the *onus* lies on the defendants in error to shew that he did take in fee, but it is apprehended that it is for the plaintiffs in error to make out that he did. In *Wood* v. *Baron* (*a*), under a devise to *A.* of all the testator's whole estate and effects, real and personal, &c. who shall hold and enjoy the same as a place of inheritance to her and her children or her issue for ever; and if it should so happen that *A.* should die leaving no child or children, or *A.*'s children should die without issue, then over; it was held that *A.* took an estate-tail. Lord *Kenyon* there said, "But it is a general uncontrollable rule, that that which may take place as a remainder, shall never take place as an executory devise." In *Broadhurst* v. *Morris* (*b*) the testator devised all his share of his two estates in *W.* to his daughter *E. B.* for life, and at her decease to *J. B.* her husband during his life; and at the decease of his said son-in-law *J. B.*, he directed that the whole legacy to him should go to his grandson *W. B.*, and to his children lawfully begotten for ever; but in default of such issue *at his decease*, to the testator's grandson *A. B.*, his heirs and assigns for ever; and it was held that *W. B.* took an estate-tail in the shares of the estates in *W.* *Wyld* v. *Lewis* (*c*), *Robinson* v. *Robinson*. (*d*) Here, the testator, by the use of the words "without issue" in a subsequent part of his will, explains what he means by the words "child or children" in the devise to Dr. *John Simpson.*

Secondly, the estate which Dr. *John Simpson* took, the property being copyhold and not freehold, was in the nature of a conditional fee at common law; *Moore* v.

(*a*) 1 *East*, 259.
(*b*) 2 *B. & Ad.* 1.
(*c*) 1 *Atk.* 432.
(*d*) 1 *Burr.* 38.

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Moore (*a*), *Rowden* v. *Malster* (*b*), *Pullen* v. *Lord Middleton* (*c*), *Roe dem. Crow* v. *Baldwere* (*d*), *Doe dem. Spencer* v. *Clark.* (*e*) There is no foundation for the distinction that has been suggested between copyholds which cannot be entailed, and freeholds; for the former stand on the same footing as freeholds did before the statute *de donis.* (*g*) The reasoning of Lord *Macclesfield* in *Target* v. *Gaunt* (*h*), and (as Lord *Parker*) in *Forth* v. *Chapman* (*i*), with respect to the distinction between freeholds and leaseholds, does not apply to copyholds. See 2 *Bla. Comm.* 110—112. Here, although the testator could not make an estate-tail, he might create an estate which would descend to issue. It was observed, upon this point, by the court below, in giving judgment: — "The devise to Dr. *John Simpson*, as it occurs in the first part of the will, is in these terms — 'to him his heirs and assigns for ever; but if it shall happen that he shall die without leaving any child or children,' then over to the five illegitimate children of the testator. But whatever might have been the construction of this devise, if nothing more had been expressed upon it in the will, we think the testator has, in a subsequent part of his will, expressly declared his own meaning of the devise to be,—if the first taker should die 'without issue.' Now it is unnecessary to cite authorities to shew that under such a devise, if the subject matter had been land of freehold tenure, the devisee, Dr. *John Simpson*, would have taken an estate-tail therein, and the devise over would have been good as a remainder. But as the land in question is copyhold, and as it is well established that copyhold land is not within the statute *de donis*, and therefore not capable of being entailed unless

(*a*) *Ambler*, 279.
(*b*) *Cro. Car.* 42.
(*c*) 9 *Mod.* 483.
(*d*) 5 *T. R.* 104.
(*e*) 5 *B. & Ald.* 458.
(*g*) *Vide post*, 905. n.
(*h*) 1 *P. Wms.* 432.
(*i*) *Ib.* 668.

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there be a custom in the manor of which it is holden (*sic.*) to create estates-tail therein; and as it is expressly found in the special case, that no such custom exists in either of the manors whereof the copyhold lands in question are respectively parcel, it follows necessarily that the devisee could not take an estate-tail under these words; but that he could only, as we think he did in fact, take that estate which such words would have created before the statute *de donis* was passed — that is, a fee simple conditional at common law. And it is the necessary consequence of holding the devisee to have taken such estate, that no remainder over can be limited or grafted upon it, there being nothing left of the original fee-simple but a bare probability of reverter to the donor." It is submitted that as, according to the ruling of the court below, Dr. *John Simpson* took a conditional fee at common law, the devise over to the testator's five natural children could not take effect, either as a remainder or as an executory devise.

Cresswell, in reply. It is said that "heirs," "children," and "issue," mean the same thing in this will; but the word "assigns" also occurs, which is not unimportant in ascertaining whether a fee-simple or a conditional fee is given. Here "issue," which occurs subsequently to "child or children," is used, not to enlarge, but to restrict, the meaning of these words. It may be true that words which will give an estate-tail in freeholds will give a conditional fee in copyholds; but it is a different proposition that words of inheritance are to be cut down to a conditional fee where the lands cannot be entailed. In the cases cited to shew that "children" had a more extensive meaning than its primary signification, the word was used as *nomen collectivum*. This is a different case from those in which the term "children" has been enlarged so as to allow all

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the descendants to take; for here a fee is given in the first instance, and there is nothing to shew that the words "child or children" were intended to apply to remote descendants.

Cur. adv. vult.

Lord Denman C. J. now delivered the judgment of the court.

This case came before us by writ of error from the court of Common Pleas on a judgment of that court given in favour of the defendants, on a special verdict. The material facts found by the jury were, that *John Simpson*— being seised in fee of certain freehold hereditaments, not now in question, and also seised in fee, according to the respective customs of the manor of *Knaresborough* and the forest of *Knaresborough*, of certain copyhold houses and lands, being the property in question in this cause, all of which he had duly surrendered to the use of his will — duly made his will, dated the 12th of *December* 1803, executed and attested for passing real estates. The will, so far as is material to the present question, is set out in the special verdict, and is as follows [His lordship read the will, and then proceeded]: The testator died in the year 1806, without having revoked or altered his will, leaving Dr. *John Simpson* his eldest son and heir, who, on his father's death, was duly admitted to the whole of the said premises according to the respective customs of the manor of *Knaresborough* and the forest of *Knaresborough*.

In the year 1825 Dr. *John Simpson* died, without ever having been married, and thereupon the lessors of the plaintiff entered, claiming title under the five natural children of *John Simpson*, the testator, under that clause in his will whereby he devised to them the property in question, in the event of his son Dr. *John Simpson* dying without leaving any child or children; and the only

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question for our decision is, whether the court of Common Pleas was right in holding that devise to be bad.

While the present lessors of the plaintiff were so in possession, the present defendants, claiming title under the will of Dr. *John Simpson*, brought an ejectment in the court of Common Pleas, and by judgment of that court recovered possession. In that action there was no special verdict, so that the facts did not appear upon the record, and could not be brought before a court of error. The then defendants, therefore, being the now lessors of the plaintiff, brought the present ejectment in the court of Common Pleas for the purpose of disputing the judgment of that court; and on the trial the facts of the case were found in a special verdict. The court of Common Pleas, without argument, decided in favour of the defendants in this second action, in conformity to their decision in the previous action; and the case has been brought before a court of error.

The property in question, it is to be observed, is copyhold; and it is found in the verdict that there is an express custom in the forest of *Knaresborough*, prohibiting the entail of lands within the forest, and that, in this respect, the custom of the manor is the same with that of the forest. In this state of circumstances it was contended on behalf of the lessors of the plaintiff — first, that even if the lands had been freehold, the devise to the testator's five natural children would have been good by way of executory devise; for that, according to the true construction of the will, Dr. *John Simpson* took an estate in fee-simple, with an executory devise over to the testator's five natural children, now represented by the lessors of the plaintiff, in the event (which has happened) of Dr. *John Simpson* dying without leaving any child living at his decease: and, secondly, that even supposing such a construction not to be that which would have been put on the words in question when

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applied to a devise of freehold lands, yet in a case like the present, where the lands are copyhold of inheritance, incapable of being entailed, such a construction might reasonably be adopted.

The court of Common Pleas (*a*) gave judgment against the present lessors of the plaintiff on both points; holding, first, that if the lands had been of freehold tenure Dr. *John Simpson* would have taken an estate-tail, with remainder over to the five natural children through whom the lessors of the plaintiff derive title; secondly, that the lands being copyhold, incapable of being entailed, Dr. *John Simpson* took, instead of an estate-tail, a fee-simple conditional, on which no remainder could be limited (*b*); but that that circumstance did not enable the court to construe the devise to the five natural children, as an executory devise, to take effect in the event of Dr. *J. S.* dying without any child living at his decease.

We concur in opinion with the court of Common Pleas on both points; and we should not therefore have thought it necessary to give any reasons for our judgment, were it not, that on the first point, which was the matter principally argued before us, no reasons are given by the court below. In truth, the argument below was entirely confined to an attempt to distinguish this case from that of freehold lands, and to shew that the circumstance of the lands in question being unentailable copyholds, ought to induce the court to construe the words "*in case the said Dr.* John Simpson *shall die without leaving any child or children*," in the same sense as if the subject matter of the gift had been personal estate. It is to this latter question that the judgment of the court of Common Pleas is exclusively directed; and, on this point, we shall content ourselves with saying, that we fully accede to the reasoning of that judgment, which appears to us to be quite conclusive.

(*a*) 4 *N. C.* 333. (*b*) See *post, Index, Devise*, 3. n.

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Upon the other point, namely, that, independently of any distinction arising from the nature of the tenure, the gift to the five children ought to be construed as an executory devise to take effect in the event of Dr. *John Simpson* dying without leaving any child living at his decease, we think it right shortly to state the grounds on which we concur with the court below.

There can be no doubt but that where an estate is devised — to a man and his heirs, but if he die without issue, or without leaving issue, then over, — the devisee, in general, takes an estate-tail only, and not an estate in fee-simple. In such cases the courts have considered that the gift over, in the event of the first taker dying without issue, sufficiently shews, that by the word "heirs" the testator must have meant only that particular class of heirs, in default of whom the estate is given over. It is needless to cite authorities in support of this proposition. The doctrine was fully considered in the recent case of *Doe dem. Cadogan* v. *Ewart* (*a*); and it is sufficient therefore to refer to that case. In the present case, however, the gift over, after the original devise to Dr. *John Simpson* and his heirs, is not in default of his *leaving issue*, but in case he shall die *without leaving any child or children;* and it was strongly pressed upon us that where the words are *child or children*, and not *issue*, no case has gone the length of cutting down the previous gift from, — what in terms it purports to be, — an estate in fee simple.

It is true that there is not, so far as we have been able to discover, any case deciding that in such a devise the words "child," or "children," are to be considered as equivalent "to issue." But in *Doe d. Smith* v. *Webber* (*b*) Lord *Ellenborough*, in giving judgment, stated, that the words "child" or "children" must, in that case

(*a*) 7 *Ad. & E.* 636., 3 *Nev. & P.* 197.

(*b*) 1 *B. & Ald.* 720.

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mean issue, for a reason which is easily applicable to the case now before us, namely, that, upon any other construction, the grandchildren of the devisee would be excluded, in the not improbable event of his leaving grandchildren but surviving all his children. It is true that the decision in that case did not necessarily require such a construction; so that the case cannot be treated absolutely as an authority in point; still the opinion of the court of King's Bench, pronounced after deliberation, is certainly entitled to very great attention; and the extreme improbability that the testator, in the case before us, could have meant, upon the mere accident of his having no grandchildren living at the death of his son, capriciously to disinherit his remote issue, seems of itself a very strong ground for construing the word "children" in the sense of "issue" generally.

Further, it is to be observed, that, in this case, if the devise had been to Dr. *John Simpson* and his children, then on the authority of *Wild*'s case (*a*), there can be no doubt but that the construction would have given Dr. *John Simpson* an estate-tail, in the same way as if it had been to him and his issue; it is not, therefore, unreasonable to suppose that the testator meant to use the words in question in the sense which they would undoubtedly have borne, if they had been used to indicate, the estate given to Dr. *John Simpson*, and not the class, on failure of which, the gift over was to take effect.

We think, on these grounds, that even if there had been nothing else in the will to aid the construction put on these words by the court of Common Pleas, still there would have been strong grounds for contending that the judgment of that court was right. But we think that there are other parts of the will greatly con-

(*a*) 6 *Co. Rep.* 16 *b.*

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firming the preceding view of the case, and which we think fully warrant the judgment below, even if the foregoing reasons should be insufficient. The testator, it will be observed, had, besides the property now in dispute, a freehold estate at *Hampsthwaite*, and by his will he devises that estate to the child or children which his then wife should bear to him, their heirs and assigns. He then goes on to devise the property now in dispute to his son, Dr. *John Simpson*, and in the event of his leaving no child or children, then to his (the testator's) five natural children, with certain limitations, in the nature of cross remainders among one another; and then he proceeds to direct that if his then wife should leave no issue to inherit the estate at *Hampsthwaite*, then that estate should be subject to the same mode of distribution amongst his five natural children as the other property (*i. e.* that now in question) "*given and bequeathed to my said son Dr.* John Simpson, — *in case he die without issue.*" We consider this an interpretation by the testator himself of the word "children," as used by him in the previous part of the will. It is as if he had said, that, by the previous part of his will, he had given the property in dispute to his five natural children, only in the event of Dr. *John Simpson* dying without issue; and he had not, in fact, said this unless the word "children" be read, as we think it must, as being synonymous with "issue."

An attempt indeed was made, in the able argument addressed to us on behalf of the lessors of the plaintiff, to convince us that instead of treating the word "issue" in this latter clause as shewing the sense in which the testator had previously used the word "children," we ought to take a contrary course, and infer from the mode in which the words "children" and "issue" are used in different passages of the will, that the testator, by the word "issue," as used in the latter part of the clause

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giving the *Hampsthwaite* estate to his five natural children, meant *child* or *children*. We have given full consideration to this argument, but we do not feel convinced by it; and, therefore, on the grounds on which we have already stated, the judgment below must be affirmed.

Judgment affirmed (*a*).

(*a*) *Vide post, Index, Devise, 3.* n.

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The STOCKTON and DARLINGTON Railway Company *v.* BARRETT.

Where the language of an act of parliament obtained by a company for imposing a rate or toll upon the public is ambiguous, or will admit of different meanings, that construction is to be adopted which is most favourable to the public.

Where, therefore, an act of parliament contained a section, one clause of which authorised a railway company to demand a rate not exceeding 4*d.* per mile upon *all coal* carried along the railway, and a subsequent clause of the same section directed that for *all coal* shipped for *exportation* a rate not exceeding ½*d.* per ton per mile should be charged; it was held, that the second part of the clause was to be read as an *exception* engrafted upon the first; and also that coals shipped for *London* were coals shipped for the purpose of *exportation*.

Where an act of parliament directed that a railway company should take a lower rate of tonnage upon goods conveyed by the railway and shipped in the port of *A.*, goods shipped at a place within the legal port of *A.*, but at some distance from the town of *A.*, were (under the circumstances) held to be entitled to the benefit of the reduction, though the act had previously spoken of the port and town of *A.*

THE defendants below having brought a writ of error upon the judgment of the court of Common Pleas (*a*) in this case, the errors assigned were argued in the vacation after *Michaelmas* term 1841 (*b*), before Lord *Denman* C. J., Lord *Abinger* C. B., *Parke* B., *Patteson* J., *Alderson* B., *Williams* J., *Coleridge* J., and *Rolfe* B.

Sir *W. W. Follett* Solicitor-General, (with whom were *Addison* and *Smythe*), for the plaintiffs in error.

(*a*) *Antè*, Vol. II. 134.

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First, the sixty-second section of the 1 & 2 *G.* 4. *c.* xliv. (*a*), the first of the *Stockton* and *Darlington* railway acts, must be construed with a view to the state of things at the time when that act passed. It is found by the special verdict, that before that time, there was no railway from which coals could be shipped at the port of *Stockton-upon-Tees*, or along which they could be carried for exportation there. The formation of the railway was therefore in fact the creation of the export coal-trade from *Stockton-upon-Tees*; and the railway company were entitled to a reasonable compensation of the facilities afforded by them to the promotion of that trade. Taking the whole of the sixty-second section together, the fair construction is, that the mileage duty of ½*d.* per ton, imposed by the fifth branch of that section, is cumulative (*b*), and in addition to that of 4*d.* per ton, previously imposed, by the second branch of the section, upon "all coal" carried along the railway. But even supposing it were intended, that coal shipped for exportation at *Stockton-upon-Tees* should be charged with the lesser duty only, such duty would clearly only be applicable where the coal exported was to be carried the *whole* distance along the *Stockton* and *Darlington* railway to the port of *Stockton-upon-Tees*, as no other railway then existed by which it could have been carried. [*Alderson* B. You would read the words at the beginning of the section, "for the tonnage of all goods &c., which shall be carried or conveyed upon the railways or tramroads" in conjunction with the words in the fifth clause, "which shall be shipped on board of any vessel or vessels in the port of *Stockton-upon-Tees* aforesaid, for the purpose of exportation;" so as to make the whole one sentence. But the company might have had no means of ascertaining the destination of the

(*a*) *Antè*, Vol. II. 145. (*a*). *Lockwood*, 9 *M.* & *W.* 378.;
(*b*) See *Attorney-General* v. 10 *M.* & *W.* 464.

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coals unless they were under their control during the whole of the transit.] Some arrangement as to entering the coals might have been made to get over that difficulty. It is possible that the smaller rate of remuneration may have been considered sufficient when the whole length of line was traversed; and that the higher rate was reasonable when only a small portion of the railway would be used. There could hardly have been a question raised on this point, if the case had arisen before the *Clarence* Railway was constructed.

Secondly, whatever may be the construction put upon the sixty-second section of this act, as to whether the lower duty is an exception from the higher duty or an addition to it — it is obvious that the inclined plane duty is payable for all coals carried along the railway, whether for exportation or for home consumption, under the twenty-first section of the 4 *G.* 4. *c.* xxxiii. (*a*)

Thirdly, coals shipped at *Port Clarence* cannot be said to be shipped "in the port of *Stockton-upon-Tees*" within the meaning of the fifth clause of the sixty-second section of the 1 & 2 *G.* 4. *c.* xliv. (*b*). The preamble of that act recites that the formation of the projected railway "will be of great public utility, by facilitating the conveyance of coal, iron, lime, corn, and other commodities, from the interior of the county of *Durham* to the town of *Darlington*, and the *town and port* of *Stockton*, and towards and into the north riding of the county of *York*; and also the conveyance of merchandise and other commodities from the said *town and port* of *Stockton* to the said town of *Darlington*, and into the interior of the said county of *Durham*." A shipment, therefore, at *Port Clarence* cannot be said to be a shipment from "the town and port of *Stockton*," which, in the preamble, is taken as the terminus of the railway.

(*a*) *Antè*, Vol. II. 150. (*c*) (*b*) *Ibid.* 145. (*a*)

Fourthly, the term "exportation" must be taken — according to its ordinary and accustomed sense — to signify a carrying from this country to some other country (*a*), and not a shipment merely from one home port to another home port.

Sir *T. Wilde* Serjt., for the defendant in error, urged in substance the same arguments as those he had insisted upon in the court below (*b*), and they are not therefore repeated in this place. In addition to the cases previously cited as to the construction of acts of parliament, he referred to *The Hull Dock Company* v. *La Marche* (*c*), *The Stourbridge Canal Company* v. *Wheeley* (*d*), *Rex* v. *The Hungerford Market Company, in re Gosling* (*e*), and *Webb* v. *The Manchester and Leeds Railway Company.* (*g*)

Sir *W. W. Follett* was heard in reply.

Cur. adv. vult.

Lord Denman C. J. now briefly stated that the court of error concurred in the judgment pronounced by the court of Common Pleas, as well as in the reasons given by that court; which their lordships did not think it necessary to repeat.

Judgment affirmed. (*h*)

(*a*) *Vide antè*, Vol. II. p. 155. (*a*).

(*b*) *Antè* Vol. II. p. 145. *et seq.*

(*c*) 8 *B. & C.* 42., 2 *Mann. & Ryl.* 107.

(*d*) 2 *B. & Ad.* 792.

(*e*) 1 *N. & M.* 548.

(*g*) 4 *Myl. & Cr.* 116.

(*h*) A writ of error has been since brought by the defendants below returnable in the House of Lords.

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Feb. 15. GALLOWAY *v.* JACKSON and Another.

In assumpsit upon a memorandum of charter (varied by a subsequent agreement between the plaintiffs and defendant)

ASSUMPSIT. The first count of the declaration stated, that on the 2nd of *December* 1834, by a certain charter-party (*a*) then made between certain persons trading under the firm of *G., L., J.* and *S.*, on behalf of the owners of the vessel, and the defendant;" that it was agreed that the ship, then at *A.*, should sail to *B.*, and there load certain quantities of iron and coals, and should proceed therewith to *C.* and there deliver the same, on payment of freight, &c.; forty running days to be allowed for loading at *B.* and for unloading at *C.*, *to commence on the* 16*th of December* 1834. After mutual promises, the declaration averred that the ship then being at *A.*, with *the consent of the plaintiffs and the defendant*, and at the *request of the defendant*, remained at *A.* for the purpose of receiving certain coals, part of her cargo for the voyage, in lieu of loading such coals at *B.*; that the ship was, without any default or neglect of the plaintiffs, detained for that purpose at *A.* until the 17th of *December;* that the defendant discharged the plaintiffs from performing that part of the charter which related to the sailing of the ship from *A.* to *C.*, up to and until she had completed the loading of the coals at *A.*; that being so loaded, the ship proceeded to *B.*, and arrived there on the 10th of *January* 1835, and took in the remainder of her cargo. The declaration assigned four breaches; first, that the defendants detained the ship at *B.* twenty days over and above the lay days and the days of demurrage, whereby the plaintiffs were put to expense in maintaining the master and mariners, and whereby a large sum of money became payable to *the plaintiffs* for demurrage; secondly, that the defendants further detained the ship at *C.*, whereby the plaintiffs were put to further expense in maintaining, &c.: thirdly, non-payment of freight; fourthly, non-payment of demurrage.

The defendant pleaded to so much of the first count as related to the demurrage, that he did not *consent and request* that the ship might remain at *A.*

Upon a trial of the issue taken by this plea, it was found by the jury that the defendant had *consented* to the new arrangement, but that the plaintiffs and not the defendant made the *request.*

Held, that consent only was material, and that the verdict so found upon this issue was a verdict for the plaintiffs.

Held also, that it was not a condition precedent to the claim to the demurrage that the ship should be at *B.* on the 16th of *December;* and that, consequently, it was not an objection to the declaration that it contained no averment that the ship was at *B.* on that day.

But held, that the declaration was bad, in not shewing that the plaintiffs were the owners for whom the memorandum of charter was made.

(*a*) A charter-party is an instrument under seal, upon which debt or covenant will lie, but not assumpsit. It is however not unusual amongst merchants to call every written contract of charter a charter-party, even though such contract be contained, as here, in an unsealed memorandum.

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trading under the firm of *G. L. Jackson* and Sons, on behalf of the owners of the *City of Rochester, then at Pembroke*, and the defendant, charterer of the said vessel, it was agreed that the said ship being tight, &c. should with all convenient speed sail and proceed to *Cardiff*, or so near thereunto as she might safely get, and there load from the factors of the said merchant about 400 tons of iron (not pig), which the said merchant bound himself to ship, together with 150 tons of coals, but not exceeding what she could reasonably stow and carry over and above her tackle, &c.; and being so loaded should therewith proceed to *Alexandria*, or so near thereto as she could safely get, and deliver the same on payment of freight, &c. as follows, — at and after the rate, &c., payable in cash on signing bills of lading, less the sum of 200*l.* to be reserved for the use of the captain, and to be paid to him at *Alexandria* within ten days after arrival, free of deduction; forty running days to be allowed the said merchant, if the ship was not sooner despatched, for loading at *Cardiff* and for unloading at *Alexandria;* to commence on the 16th then instant; cease when loaded and despatched; recommence on arrival at *Alexandria;* and finally cease when unloaded; and ten days on demurrage over and above the said lay-days, at 7*l.* per day; the said owners agreeing to allow the said merchant a discount of 5 per cent. on the whole amount of freight and primage payable under the said charter-party. Mutual promises. Averment: that after the making of the defendant's promise, to wit, on the 2nd of *December* 1834, the said ship then being at *Pembroke, by and with the consent of the plaintiffs and defendant*, and *at the request of the defendant*, remained at *Pembroke* for the purpose of receiving on board a certain quantity of coals, part of her cargo for the said intended voyage, in lieu and instead of the said ship being loaded with such coal as aforesaid

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at *Cardiff*, as in the said charter-party mentioned; that the said ship did, *with the consent and at the request of the said defendant* (below) as aforesaid, receive on board, at *Pembroke* aforesaid, divers large quantities of coal as aforesaid, to wit, &c.; and in so doing, and without any default or neglect on the part of the plaintiffs (below) in that behalf, was, for the purpose aforesaid, kept and detained by the defendant (below) at *Pembroke* aforesaid for a long space of time, to wit, from the day and year last aforesaid until the 17th of *December* in the year last aforesaid; that the defendant (below) *did dispense with and discharge* the plaintiffs (below) from performing that part of the said charter-party which related to the sailing of the said ship from *Pembroke* aforesaid to *Cardiff* aforesaid, up to and until the time the said ship had finished and completed the loading of the said coals on board thereof at *Pembroke* aforesaid; that being so loaded as aforesaid, afterwards, to wit, on the day and year last aforesaid, the said ship being tight, staunch, and strong, and every way fitted for the voyage, did, with all convenient speed, sail and proceed to *Cardiff* aforesaid, and afterwards, to wit, on the 10th of *January* 1835 arrived at *Cardiff* aforesaid, and was then ready to receive, and did receive, on board, the said residue of the said cargo in the charter-party mentioned from the factors of the defendant (below); that afterwards, to wit, on the 2d of *February* 1835, the loading of the said ship being then complete and finished, and the said ship being ready to proceed on the said voyage,—of which the defendant (below) then had notice,—the defendant (below) kept and detained the ship at *Cardiff* aforesaid a long space of time, to wit, twenty days over and above the said lay-days and the said ten days of demurrage, in the said charter-party mentioned; whereby *the plaintiffs* (below) were put to great costs, charges, and expense, amounting to a large sum of money, to wit, 300*l.*

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in and about maintaining the master and mariners of the said ship for the said period; and lost and were deprived of the use of the said ship, and all profits thereof for the period aforesaid, and whereby a large sum, to wit, 300*l.* became due and payable *to the plaintiffs* (below), as and for the said demurrage at *Cardiff* aforesaid for the days of demurrage in the charter-party mentioned; that the said ship afterwards, to wit, on the 19th of *February* 1835 being fully laden and despatched by the defendant, proceeded with the said cargo on board to *Alexandria* aforesaid; and afterwards, to wit, on the 10th of *July* 1835 arrived there; and afterwards, to wit, on the 13th of *July* 1835 was ready to unload the said cargo; whereof the defendant then had notice. Yet the defendant kept and detained the said ship after she was so ready to unload as last aforesaid; and after such notice as last aforesaid a further space of time, to wit, thirty days over and above the said lay-days and the said ten days of demurrage, in the said charter-party mentioned; whereby *the plaintiffs* (below) were put to the further expense of 300*l.* in and about maintaining the master and mariners of the said ship for the last mentioned time, and lost and were deprived of the use of the said ship, and of the profits thereof; that a large sum, to wit, 1000*l.* became due and payable *to the plaintiffs* (below) as and for the freight and primage of, and on the said cargo on the voyage aforesaid, according to the terms of the said charter-party payable as therein mentioned; and although *the plaintiffs* (below) caused the bills of lading in the said charter-party mentioned to be duly signed and delivered to the defendant, according to the terms of the said charter-party, and *duly delivered the said cargo* according to the terms of the said charter-party; and although ten days since the arrival of the captain of the said ship at *Alexandria* aforesaid had long since elapsed; yet the defendant (be-

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low) did not nor would pay the said freight on the said bills of lading duly signed as aforesaid, less the sum of 200*l.* to be reserved for the captain as in the charter-party mentioned, or the said sum of 200*l.* so to be paid to the said captain as aforesaid, but refused and neglected so to do; and a large sum of money, to wit, 50*l.* in respect of the said freight and primage was still due and owing *to the plaintiffs*, according to the terms of the charter-party; and the defendant did not nor would pay *the plaintiffs*, the said sum of 300*l.* so due and payable for the demurrage of the said ship at *Cardiff* as aforesaid, but had wholly neglected and refused so to do.

Second count, indebitatus for freight, primage, and general average. Third count, for the use and hire of ships retained and kept on demurrage. Fourth count, for money paid. Fifth count, upon an account stated.

The defendant (below) pleaded, first, non assumpsit.

Secondly, — to so much of the first count as related to the claim for demurrage, — that the defendant did not *consent* or *request* that the said ship in the first count mentioned should remain at *Pembroke* aforesaid, for the purpose in that count mentioned, &c.; *modo et formâ*; concluding to the country.

Thirdly, — to so much of the first count as related to the claim for demurrage, — that the said ship was not kept or detained by the defendant at *Pembroke* aforesaid, for any part of the said space of time in the first count mentioned; *modo et formâ*; concluding to the country.

Fourthly, — to so much of the first count as related to the claim for demurrage, — that the defendant did not dispense with, or discharge the plaintiff from performing, that part of the said charter-party which related to the sailing of the said ship, with all convenient speed, from *Pembroke* aforesaid to *Cardiff* aforesaid, up to and until the time the said ship had finished and completed the loading of the said coals on board thereof at *Pem-*

broke aforesaid; *modo et formâ;* concluding to the country.

Fifthly, — to so much of the first count as related to the claim for demurrage, — that the said ship being so loaded with coals as in the said first count mentioned, did not, with all convenient speed, sail and proceed to *Cardiff* aforesaid; *modo et formâ;* concluding to the country.

Sixthly, — to so much of the first count as related to the claim for demurrage, — that the ship was not at *Cardiff* on the said 10th of *January* 1835, ready to receive on board the residue of the said cargo in the said charter-party mentioned, from the factor of the defendant; *modo et formâ;* concluding to the country.

Seventhly, — to so much of the first count as related to the claim therein mentioned for demurrage, — that the defendant did not keep or detain the said ship at *Cardiff* aforesaid, any part of the said time in the said first count mentioned, over and above the said lay-days and the said ten days of demurrage, in the said charter-party mentioned; *modo et formâ;* concluding to the country.

Eighthly, — to so much of the first count as related to the keeping and detention of the said ship at *Alexandria,* — that the defendant did not keep or detain the said ship after she was so ready to unload the said cargo, any part of the said time in that count mentioned, over and above the said lay-days or the said ten days of demurrage, in the said charter-party mentioned; *modo et formâ;* concluding to the country.

Ninthly, — to so much of the first count as related to the claim for demurrage and the said promise of the defendant in that count also mentioned, so far as the said charter-party and promise respectively related to the running days to be allowed to the defendant for loading the said ship at *Cardiff* and unloading at *Alexandria,* — that after the making the said charter-

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party and the said promise of the defendant, and before the arrival of the said ship at *Cardiff* aforesaid, disputes arose between the plaintiffs and the defendant, as to the time from which the said forty running days in the said charty-party mentioned to have been agreed or allowed to the defendant for loading and unloading the said ship were to commence and be computed, and the defendant, on several occasions during the continuance of such disputes, and before the arrival of the said ship at *Cardiff*, expressed to the plaintiffs, his, the defendant's, doubts as to the propriety of a particular day being specified in the charter-party, as the period from whence the said forty running days were to commence and be computed; and thereupon afterwards, and before the arrival of the said ship at *Cardiff*, according to the terms of the said charter-party, to wit, on the 14th of *December* 1834, it was mutually agreed between the plaintiffs and the defendant, that in order that the defendant's objections might be removed, the terms of the said charter-party, as to the time when the said forty running days were to commence and be computed, should be allowed by inserting in the said charter-party after the words "to commence on the 16th instant," therein set forth the following words, "or three days after the ship's arrival at *Cardiff*;" and the plaintiffs, in pursuance of the agreement aforesaid, did then alter the terms of the said charter-party, as to the time when the said forty running days were to commence and be computed, by inserting in the part of the said charter-party, signed by *G. L. Jackson* and Sons, *on behalf of the plaintiffs, as aforesaid*, and delivered to the defendant after the words "to commence on the 16th instant," therein set forth the following words, "or three days after the ship's arrival at *Cardiff*;" and the plaintiffs then accepted the said charter-party so altered in its terms as aforesaid, in substitution and satisfaction

for and of the charter-party in the first count mentioned. Averment: that the said ship did not arrive at *Cardiff* until and upon the 19th of *January* 1835; that the defendant did load the said ship at *Cardiff*, and afterwards unload the said ship at *Alexandria*, and that he did not detain the said ship over and above or beyond the space of forty running days, calculated according to the terms last aforesaid. Verification.

Tenthly,—to so much of the first count of the declaration as related to freight and primage,—that no part of the said sum of 50*l.* in the first count mentioned, in respect of the said freight and primage of and on the said cargo on the voyage aforesaid, was or is due or owing to the plaintiffs, according to the charter-party; *modo et formâ*; concluding to the country.

Eleventhly,—to so much of the first count as related to the freight and primage alleged to have become due and payable to the plaintiffs for and on the said cargo on the said voyage, according to the terms of the charter-party in that count mentioned,—that the whole amount of the freight and primage which became due and payable by the defendant to the plaintiffs under, and according to the terms of, the said charter-party, for and on the said cargo on the said voyage amounted to a certain sum of money, to wit, 864*l.* 1*s.* 3*d.*; which last-mentioned sum, after allowing and deducting therefrom a discount of 5 per cent., according to the terms of the charter-party, was reduced to a certain sum, to wit, 819*l.* 18*s.* 3*d.*, and that the defendant duly paid the last-mentioned sum to the plaintiffs and the said captain, being all that was payable for freight and primage under the said charter-party. Verification.

Upon the tenth, twelfth, and thirteenth pleas no question arose.

The plaintiffs joined issue on the first, second, third, fourth, fifth, sixth, seventh, eighth, tenth, and thirteenth

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pleas, replied *de injuriâ* to the ninth, twelfth, and fourteenth, and traversed the payment in the eleventh plea.

At the trial, before *Tindal* C. J., at the sittings after *Trinity* term, 1838, all the issues except those taken on the tenth and eleventh pleas, and so much of the first as related to the third, fourth, and sixth counts, were found for the plaintiffs — the jury as to the issue joined on the second plea finding "that the plaintiffs *requested*, and the defendant *consented*, that the ship should remain at *Pembroke* for the purpose in the first count mentioned, *modo et formâ*." So much of the first issue as related to the third, fourth, and sixth counts, and the issue taken upon the tenth and eleventh pleas, were found for the defendant; and the jury were, by consent, discharged as to so much of the first issue as related to the second and fifth counts; and they assessed the damages, generally, at 170*l.*

The defendant below, having brought a writ of error upon the judgment of the court of Common Pleas (*a*), assigned for error, amongst other matters, that "the second issue above joined between the parties was not sufficiently determined." Joinder.

The case was argued in last *Trinity* vacation, before *Parke* B., *Alderson* B., *Gurney* B., *Williams* J., *Coleridge* J., *Rolfe* B., and *Wightman* J.

Erle, for the plaintiff in error. With respect to the issue joined on the second plea, it was substantially found for the defendant (below). The allegation in the declaration is, that the ship remained at *Pembroke* by the consent of, *and* at the request of, the defendant (below) for the purpose in the first count mentioned; which allegation is denied by the second plea; and the finding of the jury upon the issue so raised, is, that the plaintiffs *requested*, and the defendant (below) *consented*.

(*a*) 5 *New Cases*, 71.

Upon that finding the defendant (below) is entitled to judgment, the allegation of consent and request being entire. [*Parke* B. The material part of the plea is the allegation of *consent*.]

Secondly, the charter-party provides that the vessel shall be ready to load at *Cardiff* on the 16th of *December* 1834; but by the subsequent contract, *Pembroke* is substituted as the loading port. Under the original contract the lay-days were to commence on the 16th of *December*; but nothing is said with respect to them in the subsequent agreement. It is submitted, that it was a condition precedent to the right of the plaintiffs to claim demurrage, that the ship should be ready to load at *Cardiff* on the day mentioned, and that the declaration is defective in not containing any allegation that the vessel was ready at that place and time, or that the defendant had dispensed with the condition.

Thirdly, no consideration appears on the face of the first count for the promise of the defendant (below). Although that count alleges the charter-party to have been made between "certain persons trading under the firm of *G. L. Jackson* and Sons," on behalf of the owners of the vessel, it contains no averment that *Jackson* and Sons are the plaintiffs in the action, or that they are the owners. There is, therefore, no consideration for the defendant's promise, without which the action cannot be supported; *Bourne* v. *Mason* (*a*), *Crow* v. *Rogers* (*b*), *Price* v. *Easton*. (*c*) [*Parke* B. There is no direct allegation of interest in the plaintiffs; but there is a general averment of performance by the plaintiffs; and the claim stated in the first breach for demurrage due to them for the detainer of the ship at *Cardiff*, could only be upon the supposition that they were the contracting parties.] The statement in the first breach is not an averment which the plaintiff would be obliged to prove. It is a

(*a*) 1 *Veatr.* 6.
(*b*) 1 *Str.* 592.
(*c*) 4 *B. & Ad.* 433., 1 *N. & M.* 303.

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mere deduction from the previous allegations. If there is no consideration for the defendant's promise, the plaintiffs clearly were not bound to fulfil the stipulations contained in the charter-party. [*Parke* B. The plaintiffs would have been *nonsuited* at the trial, if it had not appeared that they were interested. (*a*)] The jury had only to deal with the issues joined upon the record. [*Parke* B. Is it not admitted by several of the pleas, that the plaintiffs were parties to the contract?] Each plea must be taken by itself, and without prejudice to the defence raised under any other plea. [*Kelly* referred to *Stephen on Pleading*, 158., 4th ed., where it is laid down, on the authority of *Brooke* v. *Brooke* (*b*), *Bac. Abr. Trespass*, 603., that a defective allegation may be aided by pleading over.] In *Brooke* v. *Brooke* there was only a single plea, and that plea admitted a perfect cause of action. [*Parke* B. Would it not have been sufficient if there had been a distinct allegation in *any part* of the declaration that the charter-party had been entered into on the plaintiff's behalf?] That might have been so. [*Parke* B. That fact must have been proved at the trial; and the only question is, whether there are not averments in the declaration from which the fact may fairly be inferred.] It is submitted that there are not; and no advantage can be taken of any admissions in the pleas. The case is the same as if the defendant (below) had suffered judgment by default.

Kelly (with whom was *Greenwood*), for the defendants in error. With regard to the second point, it was not necessary for the plaintiffs (below) to aver that the ship was ready at *Cardiff* on the 16th of *December*; for there is nothing in the charter-party to make that a condition

(*a*) The plea of non assumpsit had put in issue the existence of those facts only which were stated or implied in the declaration. The plaintiffs would hardly have submitted to a nonsuit on the ground that they had not proved that which was not in issue.

(*b*) 1 *Sid.* 184.

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precedent. By the subsequent contract *Pembroke* is substituted for *Cardiff;* but nothing was said as to the lay-days, which having no reference to the arrival of the ship at *Cardiff*, were left as they stood under the charter-party.

With regard to the third objection, it is impossible to read the declaration without coming to the conclusion, that although it contains no express allegation of the charter-party being entered into on behalf of the plaintiffs, that fact is necessarily implied; and the finding of the jury shews that such was the case. The mutual promises import that there is something to be done on the part of the plaintiffs as well as on that of the defendant. Besides that, there is an allegation that the defendant dispensed with the performance of a portion of the charter-party by the plaintiffs, which is a direct admission, upon non assumpsit, that the plaintiffs were contracting parties. Moreover, it would be unreasonable to conclude that the Lord Chief Justice would have allowed the jury to find for the plaintiffs, unless it had appeared, if not by direct proof, yet by necessary inference, that they were parties to the contract declared upon. (*a*) Every fair and reasonable intendment is to be made in order to support the judgment. *Brooke* v. *Brooke* is directly in point. "Trespass for taking a hook, &c.; the defendant pleads that he has a way to such a wood over the plaintiff's land and he was passing there, and the plaintiff endeavoured to cut his harness and to wound him with a hook, and, therefore, he took the said hook out of the hands of the plaintiff and delivered it to the constable, &c.: and issue upon the road, and verdict for the plaintiff. And it was moved, in arrest of judgment, that the plaintiff has not shewn in his declaration, that the hook was in his possession; and it was agreed, *per curiam*, that if the de-

(*a*) *Vide antè*, 697., *post*, 977. n. (*b*), 1 *Mann. & Ryl.* 285. n. (*a*).

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fendant had pleaded not guilty the judgment should be arrested, because the plaintiff in his declaration does not say *hamum suum*, nor shew that it was in his possession. (*a*) But in this case the court were of opinion that the defendant by his special plea makes the declaration good, for the defendant pleads that he took the hook *extra possessionem* of the plaintiff; wherefore the plaintiff can well maintain this action upon his possession without any property." (*b*)

Here the averment, the want of which in the declaration is complained of, is contained in the ninth plea. [*Patteson* J. That plea was negatived by the jury.] An allegation to the like effect is to be found in the eleventh plea, upon which the verdict was for the defendant. [*Parke* B. Can you use a plea which has been found *for* the defendant, as an admission *against* him?] Whether found for or against him, it would still be an admission. [*Alderson* B. That might be so, if there had been only one plea. The question is, whether an admission in one plea can be used to supply a defect in another part of the record.] It may be that an admission in one plea cannot be used in aid of another plea; but that is different from a case where an admission in one of several pleas is sought to be used to supply a defect in the declaration. It is submitted that the court, in giving judgment, are bound to look at the whole record.

Erle in reply. The lay-days were not to commence until the arrival of the vessel at *Cardiff*. The want of an allegation of performance of a condition precedent, is not cured by verdict. *Morton* v. *Lamb*. (*c*)

As regards the third point, it is clear that an admis-

(*a*) And see *Burser* v. *Martin*, *Cro. Jac.* 46.; *Dunwell* v. *Marshall*, 2 *Lev.* 20.; *Jones* v. *Pritchard*, 1 *Keble*, 699.

(*b*) And see *Smith* v. *Miller*, 1 *T. R.* 480.; *Armory* v. *Delamirie*, 1 *Stra.* 505.

(*c*) 7 *T. R.* 125.

sion in one part of the record will not aid a defect in another part; neither can the verdict be prayed in aid by either party. With respect to the declaration itself, it contains nothing to supply the want of a distinct averment of the plaintiffs being parties to the contract.

Cur. adv. vult.

PARKE B. now delivered the judgment of the court. For the right understanding of the three objections which were raised in this case on the part of the plaintiff in error, and which were argued at the sittings of this court after *Trinity* term last, it is not necessary to state more than a small portion of the pleadings.

The declaration was in assumpsit on a charter-party not under seal, varied by a subsequent agreement between the plaintiffs and defendant below. It stated that by a charter-party made between certain persons, trading under the firm of *G. L. Jackson* and Sons, on behalf of the owners (not stating the plaintiffs to be owners) of a certain ship then at *Pembroke*, and the defendant, described as the charterer, it was mutually agreed that the ship should, with all convenient speed, proceed to *Cardiff*, and there load a cargo of iron and coals at certain freight, and deliver the same at *Alexandria*; forty running days to be allowed the charterer for loading at *Cardiff* and unloading at *Alexandria*, to commence on the 16th of *December* then instant, to cease when loaded and despatched, to recommence on arrival at *Alexandria*, and finally to cease when unloaded, and ten days demurrage over and above the lay-days, at a certain rate. The declaration proceeds to state that the charter-party being so made, in consideration thereof, and that the plaintiffs, at the request of the defendant, had promised the defendant to perform the said charter-party in all things *on the plaintiffs' part to be performed*, the defendant promised the plaintiffs to perform the

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said charter-party in all things on his part to be performed. It is then averred, that the ship, with the *consent* of the plaintiffs and defendant, and at the *request* of the defendant, remained at *Pembroke* in order to receive coals, part of the cargo, instead of being loaded with such coals at *Cardiff*, and that she received on board coals there. It is also averred that the defendant did *dispense* with, and discharge the plaintiffs from performing, that part of the charter-party which relates to the sailing of the ship with all convenient speed from *Pembroke* to *Cardiff*, up to and until the time of the completing the loading of coals at *Pembroke*; and the declaration then alleges, that the ship sailed to *Cardiff*, and assigns, as a breach, that the defendant detained the ship there in loading for twenty days over and above the lay-days and ten days of demurrage. It is then stated that the ship being fully laden, proceeded to *Alexandria*; and a second breach is assigned, that the defendant detained the ship in unloading for a further time, viz. thirty days over and above the lay-days and days of demurrage. A third breach is, the non-payment of freight for the cargo which the plaintiffs duly delivered at *Alexandria*. A fourth breach is, the non-payment of demurrage. And there are counts for freight, demurrage, and money paid.

To this declaration there were several pleas; amongst others, first, non assumpsit; to so much as claimed demurrage, that the defendant did not *consent* and request that the vessel should remain at *Pembroke* instead of going to *Cardiff*, — that the defendant did not dispense with, or discharge the plaintiffs from performing, that part of the charter-party which related to the sailing of the ship from *Pembroke* in a reasonable time, until the time the ship had completed the loading of coals there; and many other pleas, on which, or on the replications to which, issue was joined. Two of these issues, which

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applied, not to the whole of the first count, but to the demand for freight only, were found for the defendant. The other issues were found for the plaintiffs; but on that plea which alleged the consent and request of the defendant that the vessel should remain at *Pembroke* instead of proceeding to *Cardiff*, the jury found that the plaintiffs *requested* and the defendant *consented*. General damages were assessed for the plaintiffs; and judgment was given for those damages and costs.

On the argument of the writ of error, three objections were taken to the judgment of the court of Common Pleas.

The first was, that on the finding on the last-mentioned issue, the verdict was for the defendant; and that judgment ought to have been given accordingly; because the alleged *request* of the defendant was not proved, though his *consent* was; and it was contended that the allegation of consent and request was one and entire. But the judges who heard the argument are all of opinion, — and we intimated that opinion in the course of the argument, — that the allegation of *consent* alone was material, and, that being found, the verdict was for the plaintiffs.

The second objection was, that it was a condition precedent to the claim for detention and demurrage, that the vessel should be at *Cardiff* on the 16th of *December*; on which day, the lay-days for loading and unloading were to commence; and that there was no averment in the declaration of that fact. We think that there was no such condition precedent; and that if there was, the allegation in the declaration, that the lay-days had begun at *Cardiff* and expired, was, substantially, an allegation that the ship was *there* on the 16th, otherwise the lay-days would not have commenced. This objection, for that reason, cannot prevail.

The third, and most important, objection is, to the

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form of the declaration, which states the charter-party to have been made by *G. L. Jackson* and Son, on behalf of the owners, but does not aver in direct terms that the plaintiffs were the owners for whom it was made. And the objection assumes this shape, that there was no consideration for the defendant's promise, as it did not appear that the plaintiffs' promise, which was the alleged consideration, and which was, to perform every thing in the charter-party contained *on their part to be performed*, was obligatory upon them, inasmuch as it was not alleged that there was any thing in the charter-party to be performed by them, or that they were parties to it at all.

There is, indeed, no doubt as to the fact that the plaintiffs were the owners, since it is distinctly admitted in one of the special pleas that the charter-party was entered into with the plaintiffs, as being the owners; but as each set of pleas is independent of the other, and the defendant below has a right to have the case disposed of as if each plea had been the only one on the record, this admission unfortunately cannot avail the plaintiffs; and the only question to be decided is, whether, as it does not expressly, it does by necessary implication, in the statement of the contract in the declaration itself, or in any necessary averment therein contained, appear that the plaintiffs were parties contracting by the charter-party, as owners of the ship.

We do not think that there is any such necessary implication. The promise by the plaintiffs to perform all things in the charter-party contained *on their part to be performed* does not *necessarily* imply that there was any thing therein contained on their part to be performed, any more than a condition in a bond to perform *all* covenants in a certain indenture, or pay *all* legacies in a certain will, necessarily imports that there were such covenants or such legacies. In these cases

the obligor would not be estopped from pleading, that there were no covenants or legacies; for the words are general; though he would, from pleading that there was no such indenture or will; *Viner's Abridgment, Estoppel*, F.; *Paramoure* v. *During* (*a*); for those are particular. If this allegation of a promise could have been proved on the trial *only* by evidence that the charter-party was made between the plaintiffs and defendant as parties, the objection would have been cured after verdict. (*b*) But that is only *one* mode by which the allegations in the declaration could have been supported; it is not the only mode, since they might equally have been proved by evidence of a charter-party in the precise form stated in the declaration, and also by evidence of an express promise made by both the plaintiffs and the defendant, to perform all things therein contained on their parts to be performed; which promise, for the reason before stated, would not have necessarily implied any acknowledgment on the plaintiffs' part that the charter-party *did* contain any thing which they were bound to perform.

It remains to be considered, whether there is any other material averment in the declaration which necessarily involves the proof that the plaintiffs were parties to the charter-party. We have come to the conclusion, after some hesitation, that there is not. Two averments were mentioned as having that effect; one, that the defendant dispensed with, and discharged the plaintiffs from performing, that part of the charter-party which relates to the sailing of the ship with convenient speed;

(*a*) *Sir Fra. Moore*, 420. But a covenant to pay all legacies which *J. S. has* bequeathed by his will would estop the defendant from pleading that there were no legacies. *Vide Aleyn*, 52.; *Style*, 103.; *Willes*, 12.; *Wightw.* 128.; 4 *N. & M.* 267 n. (*c*); 1 *Wms. Saund.* 216. n. (2), and the cases there cited.

(*b*) See the cases collected, *Clement* v. *Fisher*, 1 *Mann. & Ryl.* 285. n.

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the other, that freight was due *to the plaintiffs*, and that *they* delivered the cargo at *Alexandria*. It may well be doubted whether the sailing with all convenient speed (*a*) was a condition precedent to the right to recover for the detention of the vessel beyond the lay-days, as it assuredly was not, to the right to recover freight; and, consequently, it is by no means certain that the averment of the discharge of that part of the contract was material, or that it needed to have been proved for any purpose; but supposing that it was necessary to prove it, we think that this might have been done without involving the proof that the plaintiffs were parties to the charter-party. The meaning of the averment is no more than this,—that by a subsequent parol agreement by the defendant with the plaintiffs, the former consented that the ship should not sail until after the coals were taken in at *Pembroke*, and should then proceed; and such proof would satisfy that averment without any evidence as to the plaintiffs' having been parties to the charter-party. Again, the allegation that freight was due to *the plaintiffs*, is only a conclusion from the other statements, and not a substantive averment, requiring proof (*b*) that the plaintiffs were owners when the charter-party was made; and the allegation that the plaintiffs duly delivered the cargo *aecording* to the charter-party, necessarily imports no more than that they did so *subsequently* to the charter-party; and, besides, the averment is immaterial except as to the claim of freight, on which the plaintiffs have not succeeded.

We are of opinion, therefore, that the judgment must be reversed. It is with great reluctance that we have arrived at that conclusion, as the objection by which the

(*a*) *Vide Constable* v. *Cloberie*, or *Clowberry*, *Palmer*. 397.; *Noy*, 75.; *antè*, Vol. II. 18. 264. 268.

(*b*) *Vide Lucas* v. *Nockells*, 4 *Bingh*. 729., 3 *Moo. & Sc.* 627., 7 *Bligh. N. S.* 140., 5 *Mann. & Ryl.* 468. n.

plaintiffs are deprived of the fruits of the present action, to which they were otherwise justly entitled, is of a purely technical nature. But, much as we regret the circumstance, it would have been a matter of still greater regret, if, in order to give effect to the supposed justice of this demand, and to remedy the particular mischief in this case, we had done any thing which should tend to unsettle the established rules of pleading, and to introduce laxity and uncertainty into this branch of the law.

Judgment reversed.

MEMORANDUM.

Francis Stack Murphy, of *Lincoln's Inn*, Esquire, having received a writ, issued in this vacation, agreeably to the provisions of the 6 *G.* 4. *c.* 95., and having, on the 25th day of *February* 1842, taken the oaths usually administered to persons called to the degree and office of Serjeant at Law, became, under that act, a Serjeant at Law sworn. He gave rings with the following motto: "*Incidere ludum.*"

END OF HILARY VACATION.

AN

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TO

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2. But where a delay until the following term would have caused great inconvenience to the parties, the court gave directions for the order to be drawn up in vacation on the production of an affidavit from the wife. *Ibid.*
3. An affidavit which alleged that the magistrate, before whom a prior affidavit annexed thereto, verifying the certificate of the acknowledgment of a deed by a married woman under the 3 & 4 *W.* 4. c. 74. had been sworn, and which sufficiently shewed the authority of the magistrate before whom the first affidavit was sworn,

and accounted for the absence of a notarial certificate, was held not to be vitiated by its stating that the former affidavit was sworn by another commissioner, it having been in fact sworn by the deponent himself. *Warburton and Others to Warburton and Another.* Page 633

4. The acknowledgment of a deed by a married woman, under the 3 & 4 *W.* 4. c. 74., where the affidavit verifying such acknowledgment, varied in its title and commencement from the form prescribed by the rule of *H. T.*, 4 *W.* 4., was allowed to pass; the affidavit being one upon which perjury could be assigned. *In re Shaw.* 237

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1. An affidavit, made by the defendant's attorney's clerk, who swears that the defendant has been advised by counsel that he has a good defence to the action on the merits, which the deponent believes to be true, is not a sufficient affidavit of merits. *Nash* v. *Swinburne.* Page 630

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1. A. having in 1835 granted to B. an annuity of 150*l.* for twenty-one years, with certain allowances to B. on the sale by him of spirits made by A. by a deed containing a proviso that when the allowances should exceed 400*l.* a year, the annuity should not be payable so long as those allowances exceeded 400*l.* a year. In 1836, by a memorandum without deed, it was agreed that in consideration of B.'s relinquishing the annuity A. should pay B. 300*l.* a year from a certain day for seven years in lieu thereof. In a letter addressed by A. to B. in 1838, and assented to by B., A. declared that B. was entitled under the deed to certain specified allowances not to be less than 400*l.* a year or to be made up to that amount, and that B. was to receive 300*l.* a year over and above all other allowances under the agreement of 1836, so as to yield him together not less than 700*l.* a year.

Held, that B. was entitled un-

der the agreement of 1836, taken by itself, to the 300*l.* a year, irrespectively of the amount of allowances receivable by him. *Home* v. *Booth and Another.* Page 709

2. Held also, that a plea of want of consideration for the agreement contained in the letter of 1838 was bad, inasmuch as after that letter had been written by A. and assented to by B., the subsisting engagement between the parties consisted of that letter and the previous agreement *taken together.* *Ibid.*

3. Held also, that no release of the annuity by deed was necessary; and that abstaining from demanding or receiving the annuity was a sufficient relinquishment. *Ibid.*

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1. Where the promise declared on was that the defendant should lay out a sum of money in the purchase of a government annuity, and the proof was, that it was entrusted to him to be invested in a government security, the variance was held to be made amendable by the judge at nisi prius under the 3 & 4 *W.* c. 42. s. 23. *Gurford* v. *Bayley.* 781

2. In ejectment the demise was laid on a day prior to that on which the right of entry (for a forfeiture) accrued. Held, that it was competent to the judge at nisi prius to amend the declaration by substituting a day on which the right of entry was complete. *Doe d. Edwards* v. *Leach.* Page 229

ANNUITY.

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APPOINTMENT.

1. In covenant by the assignee of the reversion against the administratrix of the lessee, the declaration, in deducing the title to the plaintiff, set out a deed purporting to be attested by two credible witnesses, whereby one *J. P.* in pursuance of a power appointed the premises to the plaintiff. At the trial it appeared that one of the attesting witnesses was the wife of the appointee, whereupon a verdict was entered for the defendant upon a plea which traversed the appointment.

Quære, whether the declaration might be amended, under the 3 & 4 *W.* 4. *c.* 42. *s.* 23, by stating the deed as operating *either* by way of grant or as a covenant to stand seised to uses.

The court at first inclined not to allow the amendment, except on payment of all the costs of the trial. After discussion, it was agreed that the defendant should

repair the premises under a rule of court, and that no costs should be paid by either party. *Perry* v. *Watts, Administratrix, &c.* Page 775

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1. A judge's order was obtained to enable an arbitrator to enlarge the time for making his award to the 2d of November, 1841, "or to such other or ulterior day, as the said arbitrator should ultimately appoint and signify in writing under his hand, to be indorsed on the said order of reference." The arbitrator having enlarged the time to the 2d of November 1841, made his award on the 11th of October.

   Held, that it was not necessary to indorse such enlargement on the order of reference. *Davison* v. *Gauntlett and Another.* 550

2. The cause and all matters in difference between the parties having been referred upon the usual terms, the arbitrators made their award in favour of the plaintiff, and directed that the costs of the reference and award, to be taxed, should be paid by the defendant. The costs of the suit and the costs of the reference and award were included in one bill, and were taxed at 93*l.*, for which the master gave one allocatur. No objection was made by the defendants' attorney, who signed the bill so settled. On the 4th of June judgment was signed for the debt, and the whole costs included in the allocatur, and registered pursuant to the 1 and 2 Vict., c. 110. s. 19. The plaintiff having having died on the 8th of Novem- his executor on the 12th of January, 1842, issued a sci. fa. to revive the judgment which was served on the 13th, and to which the defendant pleaded a false plea. On the 24th the defendant obtained a rule nisi to set aside the judgment, on the ground that the costs of the reference were improperly included in the judgment.

   Held, that including such costs in the judgment amounted to a mere irregularity, which has been waived by the assent of the defendant's attorney at the taxation, and by the lapse of time. *Bignall* v. *Gale.* Page 858

3. Where, in a memorandum respecting a horse-race, an umpire is appointed, and it is stipulated that "the decision of the umpire is to be final," it is not competent to either party to dispute the umpire's decision. *Evans* v. *Pratt.* 759

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ASSIGNEES.

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WRIT OF TRIAL.

1. The plaintiff agreed to enter as captain's cook on board of a brig of war, upon an undertaking by the defendant, the commander of the vessel, to pay him wages, (12*l.*

per annum) beyond the government pay, to which he would be entitled on his rating as an able seaman. Held that there was a sufficient consideration for the agreement, to entitle the plaintiff, on the service being performed, to maintain an action against the defendant for such wages. *Clutterbuck* v. *Coffin.* Page 842

2. *Semble*, that such an agreement, the services under it having been performed, need not be specially declared on. *Ibid.*

3. *Semble* per Maule J. that such an agreement is not illegal. *Ibid.*

4. In assumpsit by *A.* upon an undertaking by *B.*, to indemnify *A.* against all actions which might be brought by *C.*, and every other person or persons for or in respect of the rent then due, or to become due for Blackacre, claimed or to be claimed by him or them, the declaration stated that *C.* brought action against *A.* for rent of Blackacre, claimed to be due to *C.* for the occupation of Blackacre for a certain time then elapsed, and that *A.* was called upon, and in order to prevent further proceedings in such action, was forced and obliged to pay the sum claimed and costs, and that *B.* had failed to indemnify. Held, that the declaration was bad in substance, in not shewing that the rent *claimed* to be due, had, *in fact*, become due. *Lesenbury* v. *Evans.* 210

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1. In granting a new trial it is no ground for refusing to annex the condition of payment of costs by the party obtaining the rule, that the attorney of the adverse party was not on the roll of attorneys when those costs were incurred. *Punter* v. *Lord Grantley.* Page 295

II. *Privilege of.*

2. A plea by which the defendant alleges that he is an attorney of another court, and privileged to be sued there, may be pleaded by attorney. *Hunter* v. *Neck.* 181

III. *Presence of.*

3. A judge's order by consent, allowing the plaintiff to enter up judgment in default of payment of debt and costs in a certain time, is not void under 1 & 2 *Vict.* c. 110. s. 9. by reason of no attorney having been present. *Stevens* v. *Miller.* 228

IV. *Bill of costs.*

4. In an action for an attorney's bill of costs, the town agent of the defendant's attorney obtains an order for taxing the bill. The plaintiff cannot call upon such agent to take up the master's allocatur, and pay the fees. *Becke* v. *Cattell.* 480

5. So, where part of the business is done in the House of Lords, and the certificate of the officer of the House is necessary for the purpose of enabling the taxing master to complete his allocatur, the court

will not compel the defendant's agent to take up such certificate. *Becke* v. *Cattell.* Page 408

6. After a *bonâ fide* compromise of a cause, not entered into for the purpose of cheating the attorney of his costs, the court will not make absolute a rule for judgment as in case of a nonsuit, or require the plaintiff to give a peremptory undertaking to try. *Page* v. *Doughty.* 885

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I. *Of a Hundred.*

II. *Of a Manor.*

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See HUNDRED-COURT.

BANKRUPT.

I. *Trading.*

1. Held, that an attorney does not become a scrivener, liable to be made a bankrupt under 6 G. 4. c. 16. s. 2. by lending the money of clients and charging a procuration fee to the borrowers. *Lott and Another, Assignees, &c.* v. *Melville and Others.* 40

2. Held, also, that a transaction in which an attorney calls in and receives the money of a client, and retains the money in his possession, paying interest to that client upon the amount, is not a trading as a money scrivener. *Ibid.*

II. *Actions by assignees.*

3. *A.* being examined before commissioners of bankrupt, admits having taken property which had belonged to the bankrupt. Upon cross examination by his own attorney, he states that he purchased the property under an agreement, which he produces; a copy of which agreement is entered as part of his answer. Upon an issue of not guilty, in trespass *de bonis asportatis* brought against *A.* by the assignees, the examination of *A.* is given in evidence on behalf of the plaintiffs, to prove the asportation. Held, that this was evidence to go to the jury of the existence of the agreement, without producing, or accounting for the absence of the original document. *Goss and Another, Assignees, &c.* v. *Quinton.* Page 825

4. Feigned issue on an allegation that at the time of the seizing of certain goods in execution, the plaintiffs in the issue were entitled to the same, as against and free from a certain execution, and that the goods were not liable to be seized as against such plaintiffs. Held, that the plaintiffs who claimed as assignees under the bankruptcy of the judgment debtor, were bound to prove the trading, petitioning creditor's debt, and act of bankruptcy, though no notice had been given to dispute under the 6 G. 4. c. 16. s. 90. *Lott and Another, Assignees, &c.* v. *Melville and Others.* 40

5. *A.*, an insolvent trader, calls a meeting of his creditors, and offers a composition of 7*s.* 6*d.* in the pound, to which the majority of the creditors present assent, and his

property is advertised for sale. *B.*, one of the dissenting creditors, makes an affidavit, and gives a notice under 1 and 2 V. c. 110. s. 8. The sale proceeds, and the auctioneer, with the proceeds of the sale and other moneys collected by the trader, pays 7*s.* 6*d.* in the pound to *C.* and thirteen other creditors, nineteen creditors refusing to take the composition. In an action by the assignees of *A.*, who had been made a bankrupt against *C.* for money received to their use, the jury were told that the sale appeared to have proceeded in the hope that *B.*, notwithstanding the course he had taken, might be induced to acquiesce in the composition, and that, unless *A.*, at the time that the payment was made to *C.*, considered bankruptcy *inevitable*, it was not a payment made in contemplation of bankruptcy. A verdict being found for the defendant, the court granted a new trial as upon a verdict against evidence, but not for misdirection considering the term "inevitable," might, under all the circumstances, be referred to the means possessed by *A.* of stopping the proceedings of *B.* *Gibson and Others, Assignees,* v. *Muskett.* Page 158

6. *A.* orders a rudder to be made by *B.*, a shipbuilder, for *A.*'s ship. *B.* begins to make a rudder, which he states is *intended* for *A.* Before this intention is communicated to *A.*, and before the rudder is finished, *B.* becomes bankrupt. After the bankruptcy, *A.*, who is a creditor of *B.*, is informed that the rudder was *intended* for him, and takes it away. Held, that this acquiescence on the part of *A.*, having relation to the prior intention of *B.*, was evidence to go to the jury of an appropriation of the rudder, so as to negative the property of the assignees therein. *Goss and Another, Assignees* v. *Quinton.* Page 825

III. *Certificate.*

7. *A.*, the execution creditor of *B.*, agreed to discharge *B.* out of custody upon his executing a warrant of attorney to secure the payment of the debt by instalments, and upon *C.*'s signing an undertaking, whereby, in consideration of *A.*'s discharging *B.* out of custody in the action, *C.* undertook that *B.* should pay the debt, together with interest, by instalments. The warrant of attorney being executed, and the undertaking signed, *B.* was discharged from custody. A fiat was afterwards granted against *C.*, under which he was declared a bankrupt and obtained his certificate.

Held, that the certificate was no bar to an action against *C.* for an instalment accruing due after the fiat, inasmuch as *B.* continued liable as the plaintiff's debtor, by virtue of the warrant of attorney executed by him previously to his discharge, and the defendant's undertaking was given with reference to *B.*'s liability, and as a collateral guarantee for

the payment of the instalments secured by the warrant of attorney; and as no instalment had become due before the fiat, no debt was due from the bankrupt at the issuing of the fiat, which could have been proved under it. *Lane and Others* v. *Burghart.* Page 597

8. *A.*, being indebted to *B.*, accepts *B.*'s draft on him for the amount. Before the draft becomes due, it is agreed that it shall be renewed, *B.* taking up the old draft, and *A.* drawing a new bill. The new bill is drawn by *A.*, and negociated by *B.* *B.* omits to take up the old bill, and *A.* is sued upon it by the holder. Pending this suit a fiat issues against *B.*, and afterwards *A.* pays both bills.

Held, that upon the arrangement for a renewal of the first bill being entered into, *A.* became "a person liable for the debt of *B.*" within the meaning of the 6 G. 4. c. 16. s. 52., and that *A.*'s demand against *B.*, for not performing his engagement to take up the first bill, was provable under the fiat against *B.*, and was, therefore, barred by his certificate. *Filbey* v. *Lawford.* 468

9. To an action for money had and received brought by a bankrupt to recover a sum paid to the defendants to induce them to sign his certificate, it is a good plea that the money had been demanded by, and paid to, the assignees before the commencement of the suit. *Sievers* v. *Boswell and Others.* 524

10. A certificate obtained by giving money to a creditor, to induce him to sign it, is void. *Sievers* v. *Boswell and Others.* Page 524

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See HORSE RACE.

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See INFERIOR COURT.

1. A bill of exchange for 19*l.* 2*s.* 6*d.* drawn in *June* 1840, by *A.* upon *B.*, payable at two months date, to the order of *C.*, is indorsed by *C.* to *D.* In a bill of particulars delivered by *D.* to *C.*, in an action between them, *D.* claims, "*August* 1840, cash per dishonoured acceptance and charges, 21*l.* 6*s.* 6*d.* Variance, held immaterial. *Parsons* v. *Wilson.* 445

BILLS AND NOTES.

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I. *Nature of.*

1. A true bill of exchange is an instrument drawn in one place and payable in another. 579 n. (*d*)
2. An instrument in the form of a bill of exchange, drawn upon a joint-stock bank by the manager of one of its branch banks, by order of the directors, may be declared

upon as a promissory note. *Miller* v. *Thomson*. Page 576

3. *A.* has a sufficient property in goods shipped by *B.* for the specific purpose of placing funds in the hands of *A.* to meet a bill drawn by *B.* upon *A.* to entitle *A.* to maintain trover, although no bill of lading is executed, and *A.* holds merely a receipt signed by the mate of the vessel, acknowledging the shipment of the goods, "to be delivered to *A.*" *Evans and Another* v. *Nichol and Another*. 614

II. *Acceptance.*

4. A merchant abroad on the 21st *August*, 1840, (among other bills) drew upon the defendants, his London correspondents, a bill for 225*l.* at eighteen days date, payable to the plaintiff. The defendant refused to accept the bill; and on its being presented for payment, on the 11th of *September*, refused to pay it. On the 13th the drawer died in insolvent circumstances. On the 15th the defendants, not being aware of his death or insolvency, wrote to him a letter containing this passage:—"Respecting your drafts on us, we have to advise that we have paid, and are prepared to pay, the following," mentioning, among other bills, the one in question. In a postscript they added, "We have just been informed that the holders of the bill above, for 225*l.* had returned it to you. This they had no right to do, as we have already explained to you, they were bound to keep it till the following post day. The said bill, we are almost sure, was presented again on Saturday last; therefore we cannot conceive how it can have been sent back from this day. You ought to require proof that this bill has been returned by Friday's mail, otherwise the charge made thereon cannot be demanded of you."

Held, that the letter contained an absolute promise to pay, which amounted to a valid acceptance of the bill, and that the effect of the letter was not destroyed or altered by the postscript. *Billing* v. *Devaux and Another*. Page 565

5. Debt, by the payee against one of the two makers of a joint and several promissory notes. Plea, that the note was signed by the defendant at the request of *W.*, and for securing to the plaintiff 15*l.* due from *W.* to him, and that the defendant never had any value or consideration for the note. Replication, that the defendant had value and consideration for the note. On demurrer to this replication; Held good, as the plea disclosed a sufficient consideration for the note, so as to enable the plaintiff to maintain debt. *Sison* v. *Kidman*. 810

6. Held that the indorsee of a bill of exchange cannot maintain an action of debt against the acceptor. *Powell* v. *Ancell*. 171

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to join the whole of the members of the society. *Bawden* v. *Howell* Page 638

8. A bill of exchange for 19*l.* 2*s.* 6*d.*, drawn in June 1840, by *A.* upon *B.*, payable, at two month's date, to the order of C., is indorsed by *C.* to *D.* In a bill of particulars delivered by *D.* to *C.*, in an action between them, *D.* claims August 1840, cash per dishonoured acceptance, and charges 21*l.* 6*s.* 6*d.* Variance held immaterial. *Parsons* v. *Wilson.* 445

III. *Defence.*

9. The maker of a promissory note sued by an indorsee was allowed to plead that the indorsee was a lunatic at the time of the indorsement. *Alcock* v. *Alcock.* 268.

10. A promissory note is made by *A.* and *B.*, payable to *C.*, to secure advances from *C.* to *A.* After the note becomes due, it is agreed between *C.* and *A.*, without the privity of *B.*, that *A.* shall execute a warrant of attorney to D., as trustee for *C.*, to secure the amount of the note, and a further advance made by *C.* to *A.*: Held, that the note is not merged in the warrant of attorney. *Bell* v. *Banks.* 258

11. Held, also, that the acceptance of the new security by *C.*, unaccompanied by any binding engagements on his part, to give time to *A.*, does not discharge *B.* *Ibid.*

12. A plea that a promissory note was obtained by fraud, covin, and misrepresentation, pleaded by a surety in such note, was held not to be supported by proof that the note was given for money lent by the plaintiffs at 20 per cent. interest, in the name of a joint-stock company, fraudulently represented by the plaintiffs to have been established for the purpose of lending money at 5 per cent., and to consist of shareholders, contributors, and borrowers, and to be governed by officers elected by such shareholders, contributors, and borrowers, no such company having ever existed, and the two plaintiffs being the only lenders. *Green and Another* v. *Gosden.* Page 446

IV. *Judgment.*

13. In assumpsit against two acceptors of a bill of exchange, judgments against each are obtained by default. Separate rules to compute are irregular, although at the time the first rule was granted judgment had been obtained against the defendant only. *Field* v. *Pooley.* 756

V. *Rule to compute.*

14. In this court no affidavit is required in support of a motion for a rule nisi to compute principal and interest after interlocutory judgment. *Bridport* v. *Jones.* 637

BOND.

1. *A.*, a banker, takes from *B.*, a customer, and *C.*, his surety, a bond conditioned for the payment of all sums already advanced, or thereafter to be advanced to *B.* There is no merger; and *B.* may be sued for the balance of his ac-

count as upon a debt by simple contract. *Holmes* v. *Bell.* Page 321

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CARRIERS.

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CASE.

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1. Case lies for false representations as to the affairs of an insurance company, whereby the plaintiff was induced to effect an insurance with the company, although no actual pecuniary damage has been sustained beyond the payment of premiums. *Pontifex* v. *Bignold.* 63

2. In an action for misrepresentation as to the proceedings of an insurance company, the declaration set forth several rules and regulations of the company, and alleged that the defendant fraudulently represented that these rules and regulations had been complied with, knowing the fact to be otherwise. A plea, stating that these rules and regulations had been *so* fully complied with as was necessary for the maintenance of the company, and of such insurances as had been or might be effected, was held bad. *Pontifex* v. *Bignold.* Page 63

II. *For Misfeasance.*

3. Case, per quod servitium amisit, may be maintained by the master, although the injury done to the servant was not direct, but consequential, and the servant could not have maintained an action of trespass for such injury, but must have sued in case. *Martinez and Another* v. *Gerber.* 88

4. In case, per quod servitium amisit, a general allegation of service is sufficient without stating that the servant was hired or that he was to receive a salary. *Ibid.*

5. Case against a railway company for so carelessly and improperly managing and directing an engine, that sparks flew from the engine upon a stack of beans of the plaintiff whereby the stack was destroyed.

A case, stated for the opinion of the court, alleged, that the engines used upon the railway were such as are usually employed on railways, for the purpose of propelling the trains and carriages thereon and that the engine from which the sparks flew was used at the time in the ordinary manner, and for purposes authorised by the act incorporating the company.

Held, that the facts stated were not sufficient to enable the court to infer negligence on the part of the defendants, so as to justify the directing of the entry of a

verdict for the plaintiff; but that they did not show such an absence of negligence as to warrant the directing of the entry of a nonsuit; and the special case was withdrawn in order that the parties might go on to trial. *Aldridge* v. *The Great Western Railway Company.* Page 515

6. For negligence in keeping fire. 791 n. (*d*)

7. In an action for improperly navigating a steam-boat, whereby the plaintiff's barge was sunk, it appeared that a large steam-vessel preceded the defendant's steamboat, and partly occasioned the swell, which caused the injury, and also that the plaintiff's barge was improperly trimmed and insufficiently manned. The jury found a verdict for a fourth part of the damage actually sustained, alleging as a ground for so doing, that blame was not attributable to the defendants alone, the barge not being properly trimmed. Held, that although this allegation might have been a reason for directing the jury to reconsider their verdict, it furnished no ground for granting a new trial. *Smith and Others* v. *Dobson, Knt. and Others.* 59

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COMMON OF PASTURE.

1. Upon the trial of a feigned issue, whether *A.* is entitled, in respect of Blackacre, to a separate right of feeding and folding an *unlimited number* of sheep over certain open fields in respect of sheep *levant and couchant* upon Blackacre. Held, that the evidence negatived the unlimited right claimed, and that the verdict was properly found for the defendant, notwithstanding the rules of H. T. 4 W. 4.; which rules were held not to apply to cases of feigned issues. *Ivatt* v. *Mann.* Page 691

2. It appearing that the claim put in by the plaintiff before the commissioner was in the form in which it had been stated in the issue, and that his claim in respect of Blackacre had been admitted by the commissioner, the court discharged a rule for referring to the master to amend the issue, and for a new trial to be had upon the issue so amended. *Ibid.*

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COPYHOLD.

A copyhold is devised by *A.* to *B.* for life, remainder to *C.* in fee; *B.* is admitted, and dies. *C.* has, before entry, a descendible estate; and upon the death of *C.* his customary heir, and not the customary heir of *A.*, is entitled to the copyhold. *Doe d. Parker* v. *Thomas.* Page 815

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INFERIOR COURT.
PARTICULARS OF DEMAND.
RULE NISI.

A party served with a rule, calling upon him to show cause, is not entitled to his costs of appearing, if he has no cause to show. *Cassidy* v. *Steuart.* 575

COUNTY COURT.

See DISTRICT, 2.

COVENANT.

See APPOINTMENT.

1. In covenant upon an indenture of lease for nonpayment of rent and non-reparation, the declaration alleged, that all the estate of the lessee, in a great part of the demised premises, came to and vested in the defendant by assignment; whereupon and whereby the defendant became possessed. The defendant pleaded that the said part of the premises did not come to or vest in her by assignment.

Held, that the allegation was sustained by shewing that *A.*, an assignee of the term, demised part of the premises (the rent sued for being specifically reserved in respect of such part) to *B.*, for a period not exceeding the then remainder of the term, reserving a new rent, payable to himself, exceeding in amount that reserved by the original lease, and that the defendant was the executrix of the executor of *B.*; although the the defendant had not entered or done any act beyond taking probate of *B.*'s will. *Wollaston and others* v. *Hakewill.* Page 297

2. *Semble*, that the new rent, so far as it exceeded the amount of the rent reserved by the original lease, would be a rent-seck. *Ibid.*

DAMAGES.

See CASE.

Power of court as to assessment of, 637 (*a*)

DEBT.

See BILLS AND NOTES.

DEBT, ACTION OF.

See BILLS AND NOTES
INFERIOR COURT.

In the detinet for fish. 564 n. (*a*)

DEBTS PROVABLE.

See BANKRUPT.

DECREES.

Writs of execution upon decrees of courts of equity under 1 & 2 *Vict.*, c. 110. s. 18., must issue out of the court in which such decrees are made, and cannot be awarded by a court of common law. *Stanford* v. *Robinson.* Page 407

DEED.

See AGREEMENT.

DE INJURIA.

See PLEADING.

1. Replication of, where double, 801 n. (*b*)

DELIVERY.

See VENDOR AND PURCHASER.

DEMURRAGE.

See SHIP.

DEMURRER.

See INFERIOR COURT.

DESCENT.

See COPYHOLD.

DETINUE.

1. Where the article sought to be recovered is stated to be of the value of 20*l.*, the action may be tried before the sheriff under the 3 and 4 *W.* 4. c. 42. s. 17. *Walker* v. *Needham.* Page 557
2. For charters, to be brought in this court. 251 n. (*a*)
3. Sur bailment and sur trover may be joined. 561 n. (*a*), 564 n. (*c*)
4. Garnishment in, 564 n. (*c*)
5. Interpleader in, 564 n. (*c*)

DEVISE.

1. *A.* devised as follows: — "I devise and bequeath unto *B.* my property situate in *P.*, and also 4,000*l.*, &c., and also my farm called *S.*, situate in the parish of *H.* I leave to *C.* all my other lands situate in the parishes of *H.* and *M.* subject to the yearly payment of 150*l.* to *D.*, with power to *D.* to distrain. And should *B.* have lawful issue, the said property to be equally divided between such issue; and should she not have lawful issue, *S.* farm should become the property of *C.*"

   Held first, that the words "the said property" did not comprise the lands in *H.* and *M.* devised to *C.*

   2. That *C.* took an estate in fee in the lands in *H.* and *M.*

   3. That *B.* did not, nor would her

issue, take any estate in the lands described by *A.* as "all my other lands situate in the parishes of *H.* and *M.* *Peppercorn* v. *Peacock.* Page 356

2. A testator being seised in fee of freehold lands, and also of copyholds, within the manor and forest of *K.* (which copyholds could not be entailed) after giving a freehold estate at *H.* "to the child or children which his wife should bear to him, their heirs and assigns," devised as follows: — "I give, devise, and bequeath to my son Dr. *J. S.*, his heirs and assigns for ever, all, &c., and (amongst other property the above copyholds); but if it shall happen my said son Dr. *J S.* shall die *without child or children*, in that case I give, devise, and bequeath all the before mentioned estates, &c. unto my five children, viz., *Mary*, &c. (who were illegitimate), their heirs and assigns for ever, to be equally divided amongst them, share and share and share alike; and if any of my said five children should die before they come of age without *issue*, such share of him, her, or them so dying shall go equally amongst the survivors. My will also is, and I hereby order and direct that if my present wife *E.* should leave no issue to inherit the freehold estate at *H.*, that all the said estate at *H.* shall be subject to the same mode of distribution amongst my aforesaid five children as all the other property above mentioned given and bequeathed to my said son Dr. *J. S.* in case he die without *issue.*"

Held, that if the lands had been freehold, Dr. *J. S.* would, under the foregoing devise, have taken an estate-tail, with remainder over to the testator's five natural children, as the words "child or children" were used in the sense of "issue" generally; but that the lands being copyhold, and not being capable of being entailed, Dr. *J. S.* took a fee-simple conditional, on which no remainder could be limited. (*a*)

Held, also, that the lands being copyhold, which were not capable of being entailed, afforded no ground for construing the devise to the five natural children, to be an executory devise to take effect in the event of Dr. *J. S.* dying without any child *living at his decease.* *Doe d. Blesard* v. *Simpson.* Page 929

3. By a will (made before 1838), the testator devised Whiteacre unto *A.* and *B.* and their heirs, for the use of *C.* for life, and after her decease to the use of *D.* and *E.* as tenants in common. Held, that *D.* and *E.* took a fee. *Knight* v. *Selby.* 92

4. A copyhold is devised by *A.* to *B.* for life, remainder to *C.* in fee.

(*a*) But in *Cro. Car.* 43. it is said by Yelverton J., that a remainder limited upon an estate to the surrenderee and the heirs of his body, in a manor where no copyholder may surrender or devise his copyhold lands in tail, hath been allowed. In the principal case the special verdict is silent as to the nature of the estate which is taken under a surrender to *A.* and the heirs of his body.

B. is admitted and dies: *C.* has, before entry, a descendible estate, and upon the death of *C.* his customary heir, and not the customary heir of *A.* is entitled to the copyhold. *Doe dem. Parker* v. *Thomas.* Page 815

5. Upon the construction of the will of *A.*, containing very special provisions (which are set out in the body of the report, *antè* 328., and also in the marginal note, *ante* 327.), this court certified to the Master of the Rolls —

That the children of *A.* living at his death took a fee in six-sevenths of certain freehold property, and the whole interest in six-sevenths of certain leaseholds as tenants in common in certain proportions, as regarded males and females, in favour of males, with an executory devise in the event of any child leaving issue as joint-tenants in fee in the like proportions, and that the children of *B.*, a deceased son of *A.*, took an estate in fee in one seventh of the freehold, and the whole interest in one seventh of the leaseholds, as joint-tenants, in equal shares. That the estates and interests of the children of *A.* living at his death (with the exception of such as took effect by way of executory devise) and the estates and interests of the children of *B.* vested in them on the death of *A.*:

That the executory interests of the issue of such of the children of *A.* as were living at *A.*'s death vested in such issue respectively upon the death of his parent; and that the executory interests to arise to the surviving children of *A.* on the death of any of *A.*'s children without leaving issue, vested in them respectively on the death of such children without leaving issue:

That the children of *A.* living at his death took six-sevenths of the residuary personal property, rents, profits, and accumulations, undisposed of, absolutely, as tenants in common, in the proportions before mentioned; and that the children of *B.*, the deceased son of *A.*, took one seventh of the same residuary personal property, absolutely, as joint-tenants, in equal proportions:

That the widow of *B.* took no interest in the residuary property, either as widow or as administratrix of a deceased daughter. *Radley* v. *Lees.* Page 327

C., another son of *A.*, by his will charged his lands with an annuity of 100*l.* to his widow in lieu of dowry. Held, that this annuity was not chargeable upon the share of *C.* in the freehold and leasehold lands so devised by the will of *A.*, but that the same was chargeable upon *C.*'s share in the residuary personal property, rents, profits, and accumulations. *Ibid.*

DIMISIT.

Covenant in law arising upon this word.

DISCLAIMER.

Freehold interest lying in livery properly disclaimed only in court of record. Page 733. n. (*d*)

DISTRESS.

1. A declaration on a replevin-bond against the distrainee, alleged that the distrainee did not appear at the county court holden next after the making of the bond, and then and there prosecute her suit with effect against the distrainors. *Rider, Assignee of the Sheriff of Gloucester*, v. *Edwards*. 202
2. A plea that the distrainors entered their appearance at the next county court, and that the said suit from thence hitherto has been and still is pending and undetermined, is bad, as not shewing that the distrainee appeared at the county court, or was discharged from so appearing. *Ibid.*
3. Distress infinite. 561. n. (*b*)

DISTRINGAS.

See PRACTICE.

DOCKETING JUDGMENT.

1. A judgment against an executor need not (before the 2 & 3 *Vict.* c. 11.) have been docketed under the provisions of the 4 and 5 *W.* and *M.* c. 20. in order to entitle it to preference over simple contract debts in the administration of a testator's assets. *Gaunt and others* v. *Taylor and others*. 886

DUPLICITY.

In replication. Page 801. n. (*b*)

EJECTMENT.

See INCLOSURE ACT. Page 224 n.

1. Where a declaration in ejectment is personally served upon an attorney who is the tenant in possession, it is not necessary to explain the object of the service. *Doe d. Duke of Portland* v. *Roe*. 397
2. In ejectment the demise was laid on a day prior to that on which the right of entry (for forfeiture) accrued. Held, that it was competent to the judge at nisi prius to amend the declaration by substituting a day on which the right of entry was complete. *Doe d. Edwards* v. *Leach*. 229
3. Service of a declaration in ejectment upon a lunatic in an asylum was held to be sufficient. *Doe d. Gibbard* v. *Roe*. 87
4. After several unsuccessful attempts to effect personal service, a declaration in ejectment was left with the daughter of *A.* the tenant, on the 21st of May, the day before the term. A letter from *A.*, attorney, dated the 24th, was received on the 25th by the attorneys of the lessor of the plaintiff, stating that *A.* had put the declaration into his hands; Held sufficient to raise a presumption that the declaration reached *A.*

on the 21st, and that the service was good. *Doe d. Gibbard* v. *Roe.* Page 87

ENLARGEMENT OF TIME.

See ARBITRAMENT.

ERROR BOOKS.

See FALSE JUDGMENT.

ESTATE.

By a will (made before 1838), the testator devised as follows: — "As to my messuages, lands, and tenements, and real estate, I give and devise Whiteacre unto *A.* and *B.*, and their heirs, for the use of *C.* for life, and after her decease to the use of *D.* and *E.* as tenants in common." Held that *D.* and *E.* took a fee. *Knight and Others* v. *Selby.* 92

ESTOPPEL.

See 245 n.

EVICTION.

See SURRENDER.

EVIDENCE.

See ABSTRACT OF TITLE.
BANKRUPT.
REGISTRY OF DEEDS.
REPLEVIN.
STAMP.
STEEPLE-CHACE.

Where an agreement in writing respecting a work to be prepared by one party and to be published by the other, is expressed in short and incomplete terms, parol evidence is admissible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms. *Sweet* v. *Lee.* Page 452

EXCHANGE OF LANDS.

See INCLOSURE ACT.

EXECUTION.

1. In this court a prisoner brought up for the purpose of being charged in execution, is so charged by the court without motion, unless the prisoner pays the condemnation-money. No opposition, therefore, can be offered to the commitment of such a prisoner in execution, on the ground of any alleged illegality in the arrest. Such illegality must form the subject of a motion for a rule nisi for his discharge. *Aldridge* v. *Stanford.* 409

2. Writs of execution upon decrees and orders of courts of equity under 1 & 2 *Vict.* c. 110. s. 18., must issue out of the court in which such decrees and orders are made, and cannot be awarded by a court of common law. *Stanford* v. *Robinson.* 407

EXECUTOR.

See DOCKETING JUDGMENT.

1. In covenant upon an indenture of lease, for nonpayment of rent and non-reparation, the declaration alleged that all the estate of the

lessee in a great part of the demised premises came to and vested in the defendant by assignment; whereupon and whereby the defendant became possessed. The defendant pleaded that the said part of the premises did not come to or vest in her by assignment.

Held, that the allegation was sustained by shewing that an assignee of the term, demised part of the premises (the rent sued for being specifically reserved in respect of such part) to *B.* for a period exceeding the then remainder of the term, reserving a new rent payable to himself, exexceeding in amount that reserved by the original lease, and that the defendant was the executrix of the executor of *B.*; although the defendant had not entered or done any act beyond taking probate of *B.*'s will. *Woollaston and others* v. *Hakewill.* Page 297

Semble, that the new rent, so far as it exceeded the amount of the rent reserved by the original lease, would be a rent-seck. *Ibid.*

FALSE IMPRISONMENT.

1. Trespass for assaulting the plaintiff, and causing him to be taken to a police station, and afterwards before a magistrate, upon an unfounded charge of having unlawfully attempted to procure from the banking-house of the defendant a blank cheque-book. The defendant pleaded that he and certain other persons carrying on the business of bankers, and that one *T.* kept an account with them that the plaintiff did unlawfully endeavour to obtain from the said bankers a blank cheque-book, by falsely pretending that the said *T.* was his master, and had sent him for it: that, in pursuance of such unlawful endeavour, the plaintiff induced one *A.* to go into the banking-house, and to ask for a blank cheque-book, and did falsely pretend to the said *A.* that the said *T.* was his master, and did direct the said *A.* to tell the bankers that the cheque-book was wanted for the said *T.*: that *A.* accordingly did so, and stated that he had been so sent by the plaintiff, and that the plaintiff was waiting outside for it; whereupon the defendant accompanied *A.* to the place where the plaintiff was waiting; and *A.* stated, in the presence and hearing of the plaintiff, that he had been so sent by the plaintiff: wherefore the defendant having good and probable cause of suspicion, and vehemently suspecting that the plaintiff had, by such false and fraudulent pretences as aforesaid, unlawfully endeavoured to obtain from the said bankers a blank cheque-book for unlawful and unauthorised purposes, committed the trespasses complained of.

Held, that the plea was bad, inasmuch as it neither alleged that a felony had been committed, so

as to make it a good justification at common law, nor that the plaintiff had been "found committing" any offence against the provisions of the 7 & 8 Geo. 4. c. 29., so as to justify his apprehension without warrant, under the sixty-third section of that statute. *Mathews* v. *Biddulph.* Page 390

FALSE JUDGMENT.

See INFERIOR COURT.

1. Upon a writ of false judgment, where the whole of the error books had been delivered by one party, the court (by analogy to the rule, with respect to writs of error) refused to allow the opposite party to be heard until he paid for those books which ought to have been furnished by him. *Dempster and Another* v. *Purnell.* 375

FALSE PRETENCES.

See FALSE IMPRISONMENT.

FALSE RETURN.

1. In case against a sheriff for a false return of *nulla bona*, the declaration alleged that the defendant seized and took in execution divers goods of *A.*, the judgment debtor, of the value of the moneys indorsed on the writ, and then levied the same thereout. Plea: that the defendant did not seize or take in execution any goods of *A.*, or levy thereout the money so indorsed, *modo et formâ.* The affirmative of the issue is not proved by showing that *A.*'s goods were taken in pursuance of a warrant granted by the sheriff upon the plaintiff's writ, such goods being insufficient to satisfy a writ of *fi. fa.* delivered to the sheriff before the plaintiff's writ. *Heenan* v. *Evans and Another.* Page 398

FEIGNED ISSUE.

See BANKRUPT.

1. Upon the trial of a feigned issue, whether *A.* is entitled in respect of Blackacre to a separate right of feeding and folding an *unlimited number* of sheep over certain open fields, it appeared that *A.* had a right of common over such open fields in respect of sheep *levant and couchant* upon Blackacre. Held, that the evidence negatived the unlimited right claimed, and that the verdict was properly found for the defendant, notwithstanding the rules of *H. T.*, 4. *W.* 4., which were held not to apply to cases of feigned issues. *Ivatt* v. *Mann.* 691
2. It appearing that the claim put in by the plaintiff before the commissioner was in the form in which it had been stated in the issue, and that his claim in respect of Blackacre had been admitted by the commissioner, the court discharged a rule — for referring it to the master to amend the issue, and for a new trial to be had upon the issue so amended. *Ibid.*
3. Upon a feigned issue, whether from time immemorial there has

been, and is, within a parish a certain known portion of the parish consisting of lands called *uplands;* and whether from time immemorial there has been paid and payable by the occupiers of the lands called *uplands*, a district-modus of 4*d.* for every acre of such lands, the affirmative of the issue is established by proving that there are lands in the parish immemorially known as *uplands*, which have paid a modus of 4*d.* per acre, although no precise boundary line between the *uplands* and other lands not covered by the modus, can be shewn. *Shoobridge* v. *Ward*, 896; *Weld* v. *Ward.* Page 691

FELONY.

See FALSE IMPRISONMENT.

FINALITY OF DECISION.

See ARBITRAMENT.

FIRE.

See CASE.
VENDOR AND PURCHASER.

FORMA PAUPERIS.

1. A plaintiff may be admitted to sue *in formâ pauperis*, after the commencement of the suit. *Brown* v. *Wardle.* 534

FOREIGN ESTATE.

1. It appeared that *A.* had entered into an agreement with *B.* for the purchase of certain mines in the Brazils, and that *A.* had assigned over his interest in the mines, under such contract, to the company. It was stated by a witness that mines in the Brazils were usually transferred by an instrument in writing *by deed.*

Held, that the transfer in writing was evidence from which it might be inferred that the mines were duly conveyed; no proof having been given that, by the Brazilian law, *a deed under seal* was required. *Steigenberger* v. *Carr.* Page 191

FRANCE.

Law of, as to bills of exchange, 579 (*b*), Vol. IV. 261 (*a*)
as to legacies, 773 n. (*a*)

FRAUD.

1. A plea that a promissory note was obtained by fraud, covin, and misrepresentation, pleaded by a surety in such note, was held not to be supported by proof that the note was given for money lent by the plaintiffs, at 20 per cent. interest, in the name of a joint-stock company fraudulently represented by the plaintiffs to have been established for the purpose of lending money at 5 per cent, and to consist of shareholders, contributors, and borrowers, no such company having ever existed, and the two plaintiffs being the only lenders. *Green and Another* v. *Gosden.* 446

FRAUDS, STATUTE OF.

See LANDLORD AND TENANT.

1. An agreement between an author and a bookseller, by which the latter is to be paid an annuity for life, without any apparent consideration, and without any signature other than the initials of the parties, is void under the statute. *Sweet* v. *Lee.* Page 452

2. Articles of agreement containing the terms of a contract, which is not to be performed within a year, purporting to be made between certain persons whose names are stated at the commencement of the articles, and who are described as the contracting parties, concluded with the words, "As witness our hands," without being followed by any name or signature. Held not to be sufficiently signed within the statute. *Hubert* v. *Treherne and Another.* 743

3. The traveller of the vendors signed, at the request of the vendees, the following entry in a book of the latter: "Of North and Co. London, 150 mats Ma. sugar, at 71*s.* 6*d.*, as sample. Per sea, Fenning's wharf, first and second ships." For four years preceding a variety of similar entries had been signed by the traveller, under which the goods had been accepted and paid for.

Held, that the entry was not a sufficient note or memorandum of the contract, under the seventeenth section of the statute, to bind the vendees. *Graham* v. *Fretwell.* 368

FREEHOLD.

How disclaimed where lying in livery. Page 733. n. (*d*)

GAME.

See INCLOSURE ACT.

GAMING.

See HORSE-RACE.

GARNISHMENT.

In detinue. 564. n. (*a*)

GOODS.

See FRAUDS, STATUTE OF.

1. Goods are sold by *A.* to *B.* to be paid for by instalments, the balance to be paid before removal. *A.* allows *B.* to place the goods under lock and key upon *A.*'s premises, and delivers the key to *B.* but retains the key of the external inclosure. The balance being unpaid *B.* has not such a possession as will entitle him to maintain trover against *A.* upon a wrongful removal and sale of the goods. *Milgate* v. *Kebble.* 100

GUARANTEE.

1. In assumpsit by *A.* upon an undertaking by *B* to indemnify *A.* against all actions which might be brought by *C.* for or in respect of the rent then due, or to become due, for Blackacre, claimed, or to

be claimed, by him, the declaration stated that *C.* brought an action against *A.* for rent of Blackacre claimed to be due to *C.* for the occupation of Blackacre for a certain time then elapsed, and that *A.* was called upon and in order to prevent further proceedings in such action was forced and obliged to pay the sum claimed and costs, and that *B.* had failed to indemnify. Held, that the declaration was bad in substance, in not showing that the rent *claimed* to be due had, in fact, *become* due. *Lesenbury* v. *Evans.* Page 210

HABEAS CORPUS.

1. The mother of an illegitimate female child of between eleven and twelve years of age obtained an habeas corpus, directed to the putative father. On the child being produced in obedience to the writ, the court declared that she might use her own discretion as to where she would go, and the child being unwilling to go with her mother, the court would not permit the mother to take her by force. *Lloyd, in re.* 547

HIGHWAY.

1. Replevin by *A.* against *B.* for taking the goods of *A.* Plea, that after the passing of the 5 and 6 *W.* 4. c. 50., two justices made their warrant in writing directed to the way wardens of *H.*, and to the constable of that parish, reciting that by a certain rate *A.*, an occupier of lands in *H.*, was duly assessed to the repair of the highways of the parish in a certain sum, which had been demanded, but that *A.* had refused to pay the same, and that he had been summoned and had not appeared, whereupon the way-wardens were commanded to levy the amount by distress and sale. The plea then stated that the defendant was constable, and that *C.* and *D.* were way-wardens of *H.*, and that the warrant being delivered to *C.* and *D.* and *B.*, the latter, in aid of *C.* and *D.*, and by virtue of the warrant seized on the goods of *A.*

Held, on general demand, that the plea was neither in form nor in substance a plea under the statute; and that it was not a good plea at common law, as it did not allege that the justices had jurisdiction over the subject-matter. *Morrell* v. *Martin.* Page 581

HORSE-RACE.

See STEEPLE-CHACE.

1. A steeple-chace for 50*l.* or upwards, (between the owners (*a*) of the respective horses) is a lawful race. *Evans* v. *Pratt.* 759

(*a*) The defendant had ceased to be owner before the bet was made, as appeared by the written terms of the bet. But it was assumed by the court that each party was owner of the horse on which he betted.

2. One of the conditions of a race was that the riders should be "gentlemen-farmers or tradesmen, never having ridden as regular jockeys or paid riders," another that the decision of the committee, on any dispute, should be final. The rider of the plaintiff's horse had been in the habit of riding at races, but never had been paid for his services, although he had sometimes received his expenses. The plaintiff's right to the stakes (his horse having come in first) had been disputed on the ground of an alleged cross, and the subject had been brought before the committee, who however came to no final decision. *Walmsley* v. *Mathews.* Page 133

Held, that the rider of the plaintiff's horse was not disqualified. *Ib.*

Also, that in special assumpsit for the amount of the stakes run for, the objection, that there had been no final decision by the committee, could not be raised without being specially pleaded. *Ibid.*

HUNDRED-COURT.

1. The steward of a hundred-court, or of a court-baron, is not responsible for the misfeasance, in the execution of process, of the bailiffs of the lord of the hundred or manor, to whom process of execution, awarded by such court is usually directed. *Bradley* v. *Carr.* 221
2. Where, however, the steward directs process to persons named by the party suing out such process, taking an indemnity from such party, he is liable. *Bradley* v. *Carr.* Page 221

ILLEGITIMATE CHILD.

See HABEAS CORPUS.

INCLOSURE ACT.

See COMMON OF PASTURE.

1. Trespass, quare clausum fregit. Plea: that by a local inclosure act reciting that *A.* was lord of the manor of *Dale*, and as such was seised of the soil of the waste lands, and all mines, &c. in and under the same, and that *A.* and divers others were respectively owners of messuages, inclosed lands, and tenements within the manor and parish of Dale it was enacted, that all the wastes within the manor and parish, should be divided set out and allotted by certain commissioners; that the commissioners should set out, allot and award unto *A.* his heirs, and assigns (over and above and exclusive of such shares and allotments of and in the moor as should in pursuance of the act be allotted to him or them in lieu of his or their rights of common) one eighteenth part in value of the waste lands in full compensation for his and their right to the soil of the said waste lands, except as

thereinafter was reserved to him, and after setting out certain roads &c. should set out divide and allot the residue of the moor, &c. thereby directed to be divided and allotted unto and amongst the owners of such ancient messuages, &c. in Dale, who in respect thereof were entitled to rights of common upon the said commonable lanes, which allotments were to be taken in full compensation for the rights of common and other rights and interests upon, &c. The plea then set out a clause of the act, empowering the allottees to convey their respective interests "at any time before the execution of the award of the commissioners" and also a proviso that nothing in the act contained should defeat, lessen, or prejudice the right, title or interest of *A.* his heirs or assigns of in and to the seigniory and royalties incident and belonging to the manor, but that *A.*, his heirs, and all succeeding lords, should have, hold, and enjoy all courts, &c. fairs, markets, tolls, stallages, rights, royalties, with free warren, and liberty of hunting, hawking, fishing, and fowling, &c. matters and things to the manor, or to the lord, or to the lords thereof for the time being, incident belonging or appertaining in as full ample and beneficial a manner as if that act had not been made.

The plea, after stating that the commissioners had set out and allotted unto *A.*, his heirs and assigns (over and above and exclusive of such shares and allotments of and in the waste lands as were, in pursuance of the local act, allotted to him in lieu of his rights of common) one full eighteenth part in value of the said waste lands in full compensation for his right to the soil thereof, except as was thereby reserved to him as thereinbefore mentioned, averred that the close in which &c. was allotted to *B.*, "who took possession of and occupied the said close in which &c. in severalty under the allotment and division, and that from the time of such allotment until and at the time when, &c. the close in which, &c. had been possessed and occupied in severalty by *B.*, and the plaintiff and those claiming under *B.* by virtue of the allotment;" and that *A.* being seised in fee of the manor of Dale, together with the rights, royalties, members and appurtenances conveyed the same to *C.* father of *D.*, one of the defendants to whom the same descended as the son and heir of *C.*, and justified the entry of *D.* as lord of the manor, and by the others as his servants, upon the close in exercise of a right of hunting and fowling

Held, first, that the plea showed such an exclusive possession of the close in the plaintiff as to entitle him to maintain trespass; and that consequently it was immaterial whether or not the legal seisin was still vested in the lord.

Secondly, that the right of sporting

over the allotments of the waste lands was not reserved to the lord by the saving clause in the inclosure act, the object of the clause being to reserve to the lord all those manorial rights which he possessed before the inclosure, as lord, except the right to the soil; and the power of the lord to sport over a waste within his manor, being not a licence or liberty but a mode of enjoyment of his own property. *Greathead* v. *Morley.* Page 139

2. The proprietors of lands in the parish of Dale having agreed upon an inclosure under the provisions of the 6 and 7 *W.* 4. *c.* 115. two of such proprietors *A.* and *B.* sign, and send to the commissioners, mutual consents to give up certain closes designated by the numbers attached to them in the commissioners' map, in exchange for such other lands of equal value, as the commissioner may consider desirable for them respectively, with an undertaking to ratify and confirm what the commissioner may do in the premises. The commissioner prepares and signs a schedule specifying the particular closes to be exchanged, which he produces at a public meeting duly convened under the act. The parties take possession of, cultivate, and demise the closes exchanged agreeably to the schedule.

The commissioner not having published his award —

Held that ejectment may be maintained by *A.* to recover from *B.* a close given up by *A.* to, and taken possession of by *B.* under the exchange. *Doe dem. Duke of Beaufort and Others* v. *Neeld.* Page 271

INDEMNITY.

See ASSUMPSIT.

INDENTURE.

1. In trover for an expired lease, by lessor, the lease, *i.e.* the counterpart executed by the lessor, not being produced by the defendant, upon notice, it was held that the lessor might give parol evidence of the contents without producing the counterpart executed by the lessee. *Hall* v. *Ball.* 242
2. Held, that after the expiration of a lease (containing covenants by the lessor) the lessor is not entitled to the possession of the indenture as against the lessee. *Ibid.*

INDORSEMENT.

See BILLS AND NOTES.

INFANT.

1. A rule obtained by the defendant, calling on the plaintiff, an infant suing by his prochein amy, to give security for costs, on the ground that the latter could not be found at the place mentioned in the plaintiff's petition, and that the plaintiff's attorney professed to be unable to furnish more precise

information, was discharged with costs. *Hayes* v. *Carr*. Page 852

INFERIOR COURT.

1. A declaration in a county court after stating that the defendant was summoned to answer the plaintiffs in an action of debt without mentioning a sum demanded, proceeded to state that the defendant on &c. at &c., within the jurisdiction of the court, was indebted to the plaintiffs in 1*l.* 19*s.* 6*d.* for goods then and there sold and delivered, and in 1*l.* 19*s.* 6*d.* for money found due on an account then and there stated, " which several sums were to be respectively paid by the defendant to the plaintiffs on request; whereby, and by reason of the non-payment thereof, an action hath accrued to the plaintiffs to demand and have of and from the defendant the said several sums respectively, amounting to the sum of 1*l.* 19*s.* 6*d.* Yet the defendant hath not paid the said sum above demanded, or any part thereof, to the damage of the plaintiffs of 1*l.* 19*s.* 6*d.*

Held, that a demand exceeding 40*s.* appeared on the face of the declaration, and consequently that the county court had no jurisdiction, and that the bill of particulars (which was returned as part of the proceedings) could not be resorted to in order to show that, in reality, the demand was below 40*s.* *Dempster* v. *Purnell.* 375

2. Upon a plea in the nature of a demurrer to the jurisdiction, the county court gave judgment for the defendant, awarding him costs. This court reversed that judgment, and gave judgment that the defendant go thereof without day in the said court, being the same judgment which the court below ought to have pronouced. *Dempster and Another* v. *Purnell.* Page 375

3. In a declaration in an action removed by writ of *pone* from the sheriff's court, it need not be alleged that the causes of action arose within the jurisdiction of that court. *Powell* v. *Ancell* 171

4. So, although the declaration recited that the action was commenced by writ of justices. *Ibid.*

INDEBITATUS ASSUMPSIT.

For goods in specie. 564 n. (*a*)

INITIALS.

See FRAUDS, STATUTE OF.

INSOLVENCY.

See BILLS AND NOTES.

1. INSOLVENT.

See PLEADING.

An assignment by an insolvent, within three months before his imprisonment, in trust for creditors executing the deed, is by the 1 & 2 *Vict. c.* 110. *s.* 57. void, as against his assignees appointed under the statute, if made without

a new consideration and without pressure. *Thompson* v. *Jackson and Another.* Page 621

INSURANCE.

See CASE, 1, 2.

INTEREST.

See JUDGMENT, 3.

INTERLOCUTORY JUDGMENT.

See RULE TO COMPUTE.

INTERPLEADER.

See BANKRUPT.

1. Where the claimants of goods taken in execution fail upon an issue directed to try the validity of the claim under the interpleader act, the course is to require them to pay the costs of the application and of the subsequent proceedings. *Melville and Others* v. *Smark.* 57
2. So, where the claimants set up a claim as assignees of a bankrupt, and they fail upon the insufficiency of proof of the bankruptcy. *Ibid.*
3. In detinue. 564. n. (*a*)

INVENTION.

See PATENT.

IRREGULARITY.

See ARBITRAMENT.

JOINT-STOCK COMPANY.

See BILLS AND NOTES.
FRAUD.
PLEADING.

1. The prospectus of a joint-stock company, established for the working of mines in the Brazils, stated that the capital was to consist of 100,000*l.*, in 5,000 shares of 20*l.*, 3*l.* per share to be paid on the apportionment of the shares. Only 4,225 shares being subscribed for, some of the directors took the remaining shares, but one or two never paid the deposit thereon, having merely given their promissory notes for the amount, which notes were not taken up. In their first annual report, the directors, however, stated that the whole of the shares had been appropriated and the deposit thereon paid. The defendant was a shareholder, who had paid the deposit on his shares, and two additional calls, and had called several times at the office of the company to ask for information as to the affairs of the company, and had attended a meeting of the shareholders.

   Held, that as the defendant had the knowledge or the means of knowledge, of the proceedings of the directors, the jury were justified in coming to the conclusion that he had sanctioned their acts, and, in considering him liable in respect of a contract entered into by them with reference to the working of the mines. *Steigenberger* v. *Carr.* Page 191

JUDGE'S ORDER.

See PARTICULARS OF DEMAND.

1. A party who considers himself aggrieved by a judge's order, may move to set that order aside, wholly or in part, before it is made a rule of court. *Clement* v. *Weaver.* Page 551
2. After the order is made a rule of court, a motion to set aside the order and all proceedings had thereon, without specifically mentioning the rule of court, is nugatory. *Ibid.*
3. A party comes too late to set aside a judge's order, who has lain by and allowed his opponent, without objection, to take several steps in the cause consequent upon such order. *Ibid.*

JUDGMENT.

I. *By default.*

See RULE TO COMPUTE.

II. *Setting aside.*

1. *B.*'s goods were taken in execution under a judgment obtained against him by *A.*, which was afterwards set aside for irregularity. *B.* having brought an action of trespass in the Exchequer against *A.* and his attorney, they justified under the judgment in this court, to which *B.* replied nul tiel record. A day was given to bring the record, and *A* and his attorney were ruled to produce it; and a judge's order was obtained for *A.* to bring in the roll. The roll, however, was not carried into the Exchequer until the day before that appointed for the trial by the record, and was brought in without any suggestion that the judgment had been set aside. This court vacated the judgment-roll with costs to be paid by *A.* or his attorney. *Nash* v. *Swinburne.* Page 583
2. A plaintiff, under a peremptory undertaking to try, should not withdraw the record in consequence of the absence of a witness, when it is doubtful whether the remaining witnesses can prove his case; but should rather take the chance of a nonsuit. *Chapman* v. *Davis.* 609
3. The time of entering up the judgment, from which period interest is given on the judgment-debt by 1 & 2 *Vict.* c. 110. s. 17., is the day on which judgment is signed in the master's book, and not the day on which the roll is carried in and the judgment entered of record. *Fisher* v. *Dudding.* 238
4. So, although the entry in the master's book has been amended upon a revision of the taxation of costs, and the original date of entry in the master's book remained unaltered. *Ibid.*

III. *As in case of nonsuit.*

See ATTORNEY.

IV. *Docketing.*

See DOCKETING JUDGMENT.

JURISDICTION.

See HIGHWAY.
INFERIOR COURT.
REPLEVIN.

JUSTICES.

See HIGHWAY.
REPLEVIN.

JUSTICIES.

See SHERIFF'S COURT.

LACHES.

See NEW TRIAL.
RULE.

LANCASTER, DUCHY OF.

Paddock v. *Forrester.* Page 903

LANDLORD AND TENANT.

1. *A.* enters upon premises as tenant to *B.* under an agreement, not binding, under the statute of frauds, for five years and a half from Michaelmas, 1823. In 1826 a negociation is entered into for a term of seven years "from the expiration of the present term," at an increased rent, the landlord making some alterations. The alterations are made, but no lease is executed. At Michaelmas 1829, a whole year's rent is paid at the increased rate, and payments are afterwards made on the same footing.

Held, that a notice given on the 11*th March* 1835, to quit at Michaelmas, was a valid notice *Berrey* v. *Lindley.* 498

LAY-DAYS.

See SHIP.

LEASE.

A, having demised by indenture for a term which he alleges to have been determined by forfeiture, brings trover for the lease, i. e. the counterpart of the indenture excuted by himself as lessor. Such lease or counterpart not being produced by the defendant, upon notice, it was held that *A.* might give parol evidence of the covenants of the lessee without producing the counterpart executed by the lessee. *Hall* v. *Ball.* 242

Held, that after the expiration of a lease (containing covenants by the lessor) the lessor is not entitled to the possession of the indenture as against the lessee. Page 498

LEAVE TO PLEAD.

See PLEADING.

LEGACY.

See SURGEON.

LEVANCY AND COUCHANCY.

See COMMON OF PASTURE.

LIEN.

See DEVISE.

Lieu conus. Page 230 n. (*b*)

LIMITATION OF ESTATE.

See EJECTMENT.

LIMITATIONS, STATUTE OF.

1. Assumpsit for goods sold and delivered, money lent, money paid,

and on an account stated. Pleas, first, non assumpsit; secondly, *non assumpsit infra sex annos;* thirdly, payment; fourthly, a set-off of 58*l.* 15*s.* upon a judgment, and 200*l.* for goods sold and delivered, money lent, &c. The plaintiff joined issue on the plea of non assumpsit, and traversed the other pleas except as to so much of the set-off as related to the judgment; and as to so much of the declaration as would be satisfied by the setting off of the judgment, he entered a *nolle prosequi.*

At the trial the plaintiff proved that the defendant was, at the commencement of the action, indebted to him in 28*l.* 16*s.* 11*d.*, and no more, for goods sold and delivered and money lent, accruing within six years. The defendant gave no evidence of any payment, or of any matter of set-off, beyond that which was admitted on the record.

Held, that the defendant was entitled to the verdict on the first and second issues, and the plaintiff to the verdict on the third and fourth issues. *Amor* v. *Cuthbert.* Page 1

LOAN SOCIETIES.

See BILLS AND NOTES.

LONDON.

Liability of citizens for defaults of sheriffs. 223 n. (*d*)

LUNATIC.

See BILLS AND NOTES.
EJECTMENT.

MALFEASANCE.

See CASE.
PLEADING.

MALICIOUS ARREST.

Case for maliciously, and without reasonable or probable cause, obtaining a judge's order to hold to bail, and without reasonable or probable cause for believing and not believing that the plaintiff was about to quit *England,* suing out a writ of *capias,* and causing the plaintiff to be arrested and imprisoned under such writ. Held, upon an issue of not guilty, that it was sufficient to shew that the plaintiff had been arrested under the writ, without producing the warrant. *Petrie* v. *Lamont and Another.* Page 702

MANOR.

See HUNDRED COURT.

MANUFACTURE WITHIN 21 JAC. 1. c. 3.

See PATENT.

MASTER.

See ATTORNEY.
PRACTICE.

MAXIM.

Seisina facit stipitem. 821

MEANS OF KNOWLEDGE.

See JOINT-STOCK COMPANIES.

MEDICAL ATTENDANT.
Incapable by law of France of taking legacy beyond fair remuneration for service. Page 193 (*a*)

MEMORANDA, 367, 979.

MEMORANDUM OF CHARTER.
See SHIP.

MERGER, 220 n. (*a*).
See BILLS AND NOTES. BOND.

MERITS.
See AFFIDAVIT OF MERITS.

METROPOLITAN PAVING ACT.
See RATES.

MIDDLESEX.
See COVENANT.

MINES.
See FOREIGN ESTATE.

MISDEMEANOR.
See FALSE IMPRISONMENT.

MISDIRECTION.
See BANKRUPT.

MISFEASANCE.
See CASE.

MISREPRESENTATION.
See CASE.

MISTAKE.
See PRACTICE, 3.
1. A notice of trial given for the sittings in term is, by a mere oversight on the part of the defendant's attorney, supposed by him to be a notice for the sitting after term. Notice to produce is regularly served on the defendant's attorney, and the defendant is personally informed of the approaching trial. No person appearing on the part of the defendant, the case is taken as an undefended cause, and a verdict found for the plaintiff. The court refused an application for a new trial, though moved for upon payment of costs. *Nash* v. *Swinburne.* Page 630

MODUS.
See FEIGNED ISSUE.

MONEY HAD AND RECEIVED.
See BANKRUPT.

MORTGAGE.
1. By a receivership-deed appointing *A.* to be receiver of rents and tithes forming the subject of an existing mortgage, it is covenanted that *A.* shall, in the first place, pay all the costs, charges, and expenses which he shall bear, sustain, incur, or be liable to, in, or about the collecting, receiving,

and compelling payment of, the said rents and tithes, including therein all expenses of suit, action, process, distress, and all other charges of management whatsoever, and shall pay all taxes, &c.; and, in the next place, pay the mortgage interest; and shall lastly pay the surplus to the mortgagor; deducting and detaining out of such surplus for his own use so much as he shall reasonably deserve as a compensation for his care and pains, trouble and expenses in collecting, receiving, and paying the said rents and tithes, not exceeding 1*s.* in the pound on the gross amount collected.

Held, that *A.* is entitled to deduct and detain out of the rents received, such sums as are reasonably expended by him in collecting the rents and tithes, including salaries paid to collectors before applying such rents and tithes in satisfaction or in reduction of the mortgage interest. *Gilbert and Others* v. *Dyneley.* Page 12

MOTION.

See EXECUTION.
PRISONER.

NEGATIVE PREGNANT.

792 n. (*a*).

NEGLIGENCE.

See CASE.

NEW TRIAL.

See ATTORNEY.
DETINUE.
WRIT OF TRIAL.

1. A rule absolute for a new trial, obtained in Easter term by the defendant, upon payment of costs, not having been served upon the plaintiff, the court, upon the application of the plaintiff, in Michaelmas term, discharged the rule for a new trial. *Chase* v *Goble.* Page 635

NIL DICIT.

See 115 n. (*a*).

NOLLE PROSEQUI.

See 6 n. (*a*), 9 n. (*a*), 11 n. (*a*).

1. Assumpsit for goods sold and delivered, money lent, money paid, and on an account stated. Pleas: first, *non assumpsit*; secondly, the statute of limitations; thirdly, payment; fourthly, a set off of 58*l.* 15*s.* upon a judgment, and 200*l.* for goods sold and delivered, money lent, &c. The plaintiff joined issue on the plea of *non assumpsit*, and traversed the other pleas, except as to so much of the plea of set-off as related to the judgment, and as to so much of the declaration as would be satisfied by the setting off of the judgment, he entered a *nolle prosequi.* At the trial the plaintiff proved that the defendant was, at the commencement of the action, indebted to him in 28*l.* 16*s.* 11*d.* and no more,

for goods sold and delivered, and money lent, accruing within six years. The defendant gave no evidence of any payment, or of any matter of set-off beyond that which was admitted on the record: Held, that the defendant was entitled to the verdict on the first and second issues, and the plaintiff to the verdict on the third and fourth issues. *Amor* v. *Cuthbert.* Page 1

Held, also that the effect of a *nolle prosequi*, entered as to any portion of a plaintiff's demand, before trial, is to withdraw that part of his claim from the consideration of the jury; but that such entry leaves the part of the claim so withdrawn, so entirely unaffected by the verdict as to entitle the plaintiff to maintain a fresh action in respect of it. *Ibid.*

NONSUIT.

See CASE.

1. By submitting to a nonsuit, not spontaneously but in deference to an opinion expressed by the judge that the action is not maintainable, a plaintiff is not precluded from moving to set the nonsuit aside. *Sweet* v. *Lee.* 452

NOTICE OF DECLARATION.

1. A notice of declaration was delivered between 6 and 7 o'clock in in the evening of *Saturday* the 22d of *January* at the office of the defendant's attorney, to the defendant's son, who promised to give it to his father. The defendant was not at home until after 9 o'clock, and the notice was not delivered to him until the following morning; but it did not appear at what time the son returned home. A judgment, for want of a plea, signed on *Thursday* the 27th, was set aside without costs. *Fitch* v. *Kettle.* Page 856

I. *Of objection.*

See PATENT.

II. *To quit.*

See LANDLORD AND TENANT.

III. *Of action.*

See PLEADING.

IV. *Of trial.*

2. A notice of trial given for the sittings in term, is by a mere oversight on the part of the defendant's attorney supposed by him to be a notice for the sittings after term. 630

V. *To Produce.*

3. Is regularly served on the defendant's attorney, and the defendant is personally informed of the approaching trial. No person appearing on the part of the defendant, the case is taken as an undefended cause, and a verdict found for the plaintiff. The court refused an application for a new trial, though moved for upon payment of costs. *Nash* v. *Swinburne.* 630

NOVELTY OF INVENTION.

See PATENT.

NULLA BONA.

See FALSE RETURN.

NUL TIEL RECORD.

See JUDGMENT. II.

OBJECTION.

See PATENT.

ORDERS OF COURTS OF EQUITY.

1. Writs of execution upon orders of equity under 1 & 2 *Vict. c.* 110. *s.* 18. must issue out of the court in which such orders are made, and cannot be awarded by a court of common law. *Stanford* v. *Robinson.* Page 407

PARENT AND CHILD.

See HABEAS CORPUS.

PARTICULARS OF DEMAND.

See INFERIOR COURT.

1. A bill of exchange for 19*l.* 2*s.* 6*d.*, drawn in *June* 1840, by *A.* upon *B.*, payable at two months date, to the order of *C.*, is indorsed by *C.* to *D.* In a bill of particulars delivered by *D.* to *C.* in an action between them, *D.* claims, "*August* 1840, cash, per dishonoured acceptance and charges, 21*l.* 6*s.* 6*d.* Variance held immaterial. *Parsons* v. *Wilson.* 445

2. A judge at chambers may engraft upon an order requiring a plaintiff to deliver particulars of demand under *R. T.* 1 *W.* 4., a direction to the defendant to pay the costs of the application, Per *Coltman* J. *Clement* v. *Weaver.* Page 551

PARTNERS.

1. Where a promissory note is given to two members of a loan society, by name, to secure an advance made by the society, it is not necessary, in suing upon the note, to join the whole of the members of the society. *Bawden* v. *Howell.* 638

PATENT.

1. To a declaration for the infringement of the plaintiff's patent "for certain improvements in cards for carding wool, cotton, &c., and for raising the pile of woollen and other cloths," the defendants, in their third plea, alleged that the invention was not new at the time of the granting of the patent; and their fourth plea, after setting out the plaintiff's specification, in *hæc verba* (wherein it was stated that the improvement was applicable to sheet-cards and top-cards) averred that such cards were ordinary cards at the time of the patent, and also that the plaintiff's invention was unfitted and useless for the purpose of such cards. Notices of objections, corresponding with the allegations in the pleas, were delivered in by the defendants, but none that pointed

to the unfitness of the invention to form the subject of a patent.

At the trial the judge, in summing up, left the points to the jury in the terms of the several issues, but gave no opinion as to the validity of the patent. He was then requested by the defendant's council to put two other questions to the jury, which were not distinctly raised by the issues, but he refused to do so.

Held, first, that this refusal was proper.

Secondly, that upon the issues (taking into consideration the notices of objection) the judge would not have been warranted in giving any opinion as to the validity of the patent, in respect of the fitness to form the subject of the patent.

Thirdly, that the statement of the specification in the fourth plea, being merely matter of inducement, it could not be taken advantage of in arrest of judgment upon the ground that the invention therein described was not the fit' subject of a patent (*dubitante Coltman* J.) *Walton* v. *Potter and Another.* Page 411

2. *Semble,* that the proper way to raise that question would have been, to aver that the alleged invention, as set out in the specification, was not a new manufacture within the meaning of 21 *Jac.* 1. c. 3. *Ibid.*

3. In an action for an infringement of a patent, a plea that the invention is not a new manufacture within the 21 *Jac.* 1. c. 3., involves the question not only whether the alleged patent is new, but also whether it is a manufacture, within the meaning of the statute. *Walton* v. *Bateman and Others.* Page 773

2. Of Attorney-General of Duchy of Lancaster. 920 (*b*)

PAYMENT.

Plea of. 629 n.

PAVING ACT.

See RATES.

PEERAGE.

1. Pleaded in abatement of. 187 n. (*b*)

PEREMPTORY UNDERTAKING.

See JUDGMENT AS IN CASE OF NONSUIT.

PERICULUM REI VENDITÆ.

See VENDOR AND PURCHASER.

PERJURY.

See ACKNOWLEDGMENT, &c.

PLEADING.

See FALSE IMPRISONMENT.
HIGHWAY.
IMPRISONMENT.
JUDGMENT.
LIMITATIONS, STATUTE OF.
PRACTICE.
RENT.
REPLEVIN.
SHIP.
SURRENDER.
WARRANTY.

1. The rule of *Trinity* term, 1 *Vict.*, whereby it is ordered, "that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an act of parliament, he shall insert in the margin of the plea the words, 'by statute,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament," is a rule which the courts, by virtue of their inherent jurisdiction, and independently of the 3 & 4 *W.* 4. c. 42 s. 1. had power to make. *Bartholomew* v. *Carter.* Page 125

2. A defendant pleading not guilty only, and omitting to comply with the rule, is not entitled to avail himself of the defence, that a notice of action required by a statute under which he was acting, has not been given. *Ibid.*

3. In trespass *quare clausum fregit*, the defendants, after stating a demise by *A.* the owner of the fee, for 61 years, and an assignment of the residue of the term to *B.*, and giving colour to the plaintiff, justified as the servants of *B.* Replication that one of the defendants, as the agent of, and having lawful authority from *B.*, by an agreement in writing, demised the close to the plaintiff for three years, who entered and became possessed; and that, during the continuance of that demise, the defendants, of their own wrong, and in violation of the agreement, committed the trespasses. Rejoinder, that *B.* did not demise the close to the plaintiff, *modo et formâ.* Held good, on general demurrer. *Wilkins* v. *Boutcher and Another.* Page 807

4. In trespass for breaking and entering a close, &c., and carrying away certain fixtures, and certain goods and chattels of the plaintiff, the defendant was allowed to plead,—first, not guilty; secondly, a denial of the plaintiff's property in the goods and chattels (but not of his possession of the close and fixtures); thirdly, a demise to *A.* who became bankrupt, that the defendants were appointed assignees, whereby they became entitled to the possession of the close, &c., and entered and committed the alleged trespasses giving colour to the plaintiff; fourthly, a similar demise to *A.*, and that *A.* mortgaged to *B.*, and continued in possession as tenant to *B.*; that *A.* became bankrupt, his tenancy under *B.* not having been determined; that the defendants were appointed assignees, and elected to continue tenants to *B.*, and entered and committed the alleged trespasses giving colour to the plaintiff; fifthly, that *A.* being possessed of the close, &c., for the residue of a certain term, demised to *B.* by way of mortgage, and continued in possession as tenant to *B.*; that after the mortgage, *A.* placed certain trade fixtures on the close, &c.; that *A.* and *B.*, in order to defraud the creditors and assignees of *A.*

of those fixtures (*A.* expecting shortly to be made a bankrupt), demised to the plaintiff, that *A.* became bankrupt, and that the defendants were appointed assignees, and entered. *Pim* v. *Grazebrook and Another.* Page 863

5. It is not requisite than an affidavit used in showing cause against a rule, should be sworn before such rule is due: and *semble*, that it is no objection to the using of an affidavit, that it was made after the discussion of the rule had been postponed in consequence of the party showing cause having omitted to take office-copies of the affidavits upon which the rule had been obtained. 863

Semble, that no affidavit is necessary to show that an attorney obtaining a rule in a cause, is not the attorney on the record. *Ibid.*

6. In assumpsit by a public officer of a banking company, the defendant pleaded that by an indenture made between the defendant of the first part, *A.* (therein described to be the manager of the copartnership) and *B.* of the second part, and the persons whose names and seals were thereunto subscribed and affixed (creditors of the defendant) of the third part, the defendant assigned all his effects to *A.* and *B.* in trust for his creditors; in consideration whereof the several creditors released their debts. The plea then alleged that "*A.*, so being such manager as aforesaid, executed the said indenture as such manager as aforesaid, for and in behalf of the said copartnership, and duly authorised in that behalf, and which execution thereof by *A.* as such manager aforesaid, hath been since duly ratified, confirmed, acknowleged, and acted upon by the copartnership, with the knowledge, assent, and concurrence of the several parties to the indenture." Replication, that *A.* did not execute the indenture as such manager for and on behalf of the copartnership, nor was he at any time authorised in that behalf, *modo et formâ*, &c.

Held, on special demurrer, that the replication was good, inasmuch as the several allegations in the plea traversed by the replication constituted only one defence. *Bell, Public Officer, &c., of National Bank of England* v. *Tuckett.* Page 785

7. A count upon a breach of contract by a malfeasance in employing a vessel for an illegal purpose, whereby the vessel was seized, &c., may, under the rules of *H. T.*, 3 *W.*, be pleaded with a count charging a breach of a contract between the parties in detaining the vessel beyond the time for which she was hired. *Bleaden* v. *Rapallo.* 116

8. To part of the trespasses stated in a declaration, the defendant pleads a justification. He also pleads to all the trespasses, payment of money into court, and *non damnificatus ultra.* The plaintiff

replies, *damnificatus ultra.* The jury find a verdict for the defendant upon the justification, and for the plaintiff 20*s.* damages *ultra.* Held, to be no objection to the verdict as to the 20*s.*, that it must be taken to apply in part to the trespasses justified. *Thompson* v. *Jackson and Another* Page 621

9. Conveyance to be pleaded according to legal effect, not according to words of deed. 780 n. (*c*)

PONE.

See SHERIFF'S COURT.

POWER.

See APPOINTMENT.

PRACTICE.

See EJECTMENT.
FORMA PAUPERIS.
JUDGMENT.
NOTICE OF DECLARATION.
RULE.

1. A judge's order by consent, allowing the plaintiff to enter up judgment in default of payment of debt and costs in a certain time is not void under 1 & 2 *Vict. c.* 110. *s.* 9. by reason of no attorney having been present. *Stevens* v. *Miller.* 228

2. The time for appearing to a writ of summons having expired on the 29*th* of *April*, a *distringas* was moved for on the 30*th* upon an affidavit, which stated a search on the 30*th*, and that no appearance had been entered. This affidavit proving defective it was amended and resworn on the 3*d* of *May*, when the application was renewed and granted, no further search having been made in the meantime, the court, upon an affidavit stating that an appearance had been entered on the 30*th*, the court set aside the *distringas* and subsequent proceedings. *Maclean* v. *Abrahams.* Page 113

3. In debt the defendant having obtained a rule to plead two pleas to part of the demand, and *nunquam indebitatus* to the residue, by mistake pleaded *non assumpsit* to such residue, with the other pleas. A general judgment signed by the plaintiff was held irregular. *Holliday* v. *Bohn.* 115

4. In an action for an attorney's bill of costs, the town agent of the defendant's attorney obtains an order for taxing the bill. The plaintiff cannot call upon such agent to take up the master's allocatur, and pay the fees. *Becke* v. *Cattell.* 480

5. So, where part of the business is done in the House of Lords, and the certificate of the officer of the house is necessary for the purpose of enabling the taxing master to complete his allocatur, the court will not compel the defendant's agent to take up such certificate. *Ibid.*

PRESIGNATOR FOR THE POOR. 543 n. (*a*).

PRIORITY OF EXECUTION.

See FALSE RETURN.

PRISONER.

1. In this court a prisoner brought up for the purpose of being charged in execution, is so charged by the court without motion, unless the prisoner pay the condemnation-money. No opposition, therefore, can be offered to the commitment of such a prisoner in execution, on the ground of any alleged illegality in the arrest. Such illegality must form the subject of a motion for a rule *nisi* for his discharge. *Aldridge* v. *Stanford.* Page 409

2. The court has no power under the 48 *Geo.* 3. *c.* 123. *s.* 1., to discharge a prisoner who is in custody upon a judgment exceeding 20*l.*, although it is shewn by affidavit that before the action the debt had been reduced below 20*l.* *Curtis* v. *Rickards.* 200

PRIVILEGE.

See ATTORNEY.

PROCHEIN AMY.

See INFANT.

PROFIT.

See 75 n. (*c*).

PROMISSORY NOTE.

See BILLS AND NOTES.

PROPERTY.

The ownership of goods laden on board a general ship, is, *prima facie*, in the party who was possessed of the ship at the time the goods were received on board. *Brancker and Another, Assignees &c.*, v. *Molyneux.* Page 84

QUARE CLAUSUM FREGIT.

See INCLOSURE ACT.

RAILWAY.

See CASE.

RAILWAY COMPANY.

See CASE.

RATES.

The commissioners under certain local acts, for paving, &c. the parish of *P.*, were authorised to make rates for paving, &c., to be assessed on all houses, &c. within the district, and also rates for forming, &c., and embellishing centres of squares, to be assessed on the houses, &c. to be erected and to encompass the squares. The general metropolitan paving act (57 *G.* 3. c. xxix. s. 24.) authorises the persons who, under any local act, were empowered to make rates for paving, &c. either separately or jointly with other persons, to make any such rates as

shall be necessary for paving, &c pursuant to the direction of any local acts and of that act, either separately or jointly for other purposes, and directs that such rates, and all rates made with respect to paving, &c., either separately or jointly with any other purpose, by virtue of any local act, and that act shall be laid upon every person who shall inhabit, &c. any messuage, &c. in any street within the parish.

Held, that a rate, under the metropolitan paving act, if assessed on the inhabitants generally, must be confined to purposes in which all parties rated have a common interest; and, therefore, that a rate purporting to be made by the commissioners under the local act, for the purposes of the same act upon the inhabitants, is, *ex facie*, bad, as being a joint rate for several purposes, including one purpose, namely, the embellishing of the squares, in which only a particular class of persons had an interest. *Douglas* v. *Chalk and Another.* Page 485

RECEIVER.

See MORTGAGE.

RECORD.

Disclaimer in court of, 733 n. (*d*)

RECOUPER.

5 n. (*c*); 630 n. (*c*).

REGISTER.

See SHIP.

REGISTRY OF DEEDS.

The registered memorial of a deed conveying land in Middlesex, is secondary evidence of the contents of such deed, against the personal representatives of the party by whom such deed is registered. *Wollaston and Others* v. *Hakewell.* Page 297

RELEASE.

See PLEADING.

RELINQUISHMENT.

105, 709, 733.

REMOVAL OF ACTIONS.

See INFERIOR COURT.

RENT.

See ASSUMPSIT.
COVENANT.
GUARANTEE.
LANDLORD AND TENANT.

1. Debt for 163*l.* 16*s.*, for fifty-two weeks' rent, on a *parol demise* for twelve months from *February* 25. 1839 (*Monday*), at 3*l.* 3*s.* per week. Plea: as to so much of the rent as accrued due before and on the *July* 27. 1839 (*Saturday*), payment and acceptance in satisfaction. Held, bad on special demurrer, as no weekly rent could have become due on the latter day, and no apportionment of the

rent for the fraction of a week was shewn. *Dunn* v. *Di Nuovo.* Page 105

REPLEVIN.

1. Upon an issue on the tenancy, in replevin, the verbal statements of the plaintiff, as to the terms of his tenancy, are admissible in evidence, although the tenancy was created by adopting the terms of a former demise in writing. *Howard* v. *Smith.* 254
2. Replevin by *A.* against *B.* for taking the goods of *A.* Plea, that after the passing of the 5 & 6 *W.* 4. c. 50. two justices made their warrant in writing, directed to the waywardens of *H.* and to the constable of that parish, reciting that by a certain rate *A.*, occupier of lands in *H.*, was duly assessed to the repair of the highways of the said parish in a certain sum, which had been demanded; but that *A.* had refused to pay the same, and that he had been summoned, and had not appeared, whereupon the waywardens were commanded to levy the amount by distress and sale of his goods. The plea then stated that the defendant was constable, and that *C.* and *D.* were waywardens of *H.*, and that the warrant, being delivered to *C.* and *D.* and *B.*, the latter, in aid of *C.* and *D.*, and by virtue of the warrant, seized the goods of *A.*

Held, on general demurrer, that the plea was neither in form nor in substance a plea under the statute; and that it was not a good plea at common law, inasmuch as it did not allege that the justices had jurisdiction over the subject-matter in respect of which the warrant was granted. *Morrell* v. *Martin.* Page 581

REPLEVIN-BOND.

1. A declaration on a replevin-bond against the distrainee, alleged that the distrainee did not appear at the county court holden next after the making of the bond, and then and there prosecute her suit with effect against the distrainors. A plea that the distrainors entered their appearance at the next county court, and that the said suit from thence hitherto has been and still is pending and undetermined, is bad, as not shewing that the distrainee appeared at the county court, or was discharged from so appearing. *Rider, Assignee of the Sheriff of Gloucester,* v. *Edwards.* 202

REPLICATION.

1. De injuriâ. 801 n. (*b*)

RULE OF COURT.

See FEIGNED ISSUE.

JUDGE'S ORDER.

1. When a rule is enlarged upon the motion of the party required to shew cause with the usual proviso that the affidavits used against the rule shall be filed a certain number of days before the ensuing term, the party cannot use affidavits which have not been so filed,

and he will not be allowed a further postponement of the rule unless he has been prevented by some special cause from filing his affidavits within the specified time. *Cosby* v. *Betts.* Page 882

2. In this court no affidavit is required upon a motion for a rule to compute interest. *Bridport* v. *Jones.* 637

3. In assumpsit against two acceptors of a bill of exchange, judgments against each are obtained by default. Separate rules to compute are irregular, although at the time the first rule was granted, judgment had been obtained against one defendant only. *Field* v. *Pooley.* 756

4. A party served with a rule calling upon him to shew cause, is not entitled to his costs of appearing upon the rule, if he has no cause to shew. *Cassidy* v. *Steuart.* 575

RULE IN CROGATE'S CASE.

801 n. (*b*).

SET OFF.

See LIMITATIONS.

SHERIFF.

See CASE.
DETINUE.
FALSE RETURN.
WRIT OF TRIAL.

SHERIFFS OF LONDON.

223 n. (*d*).

SHIP.

See WARRANTY.

1. In assumpsit upon a memorandum of charter (varied by a subsequent agreement between the plaintiffs and defendants) the declaration stated that the charter was made "between certain persons trading under the firm of *G.*, *L.*, *J.* and *S.*, on behalf of the owners of the vessel, and the defendant:" that it was agreed that the ship, then at *A.*, should sail to *B.*, and should there load certain quantities of iron and coals, and should proceed therewith to *C.* and there deliver the same, on payment of freight, &c.; forty running days to be allowed for loading at *B.* and for unloading at *C.*, *to commence on the 16th of December.* After mutual promises, the declaration averred that the ship being at *A.*, with *the consent of the plaintiffs and the defendant,* and at the *request of the defendant,* remained at *A.* for the purpose of receiving certain coals, part of her cargo for the voyage, in lieu of loading such coals at *B.*: that the ship was, without any default or neglect of the plaintiffs, detained for that purpose at *A.* until the 17th of *December*: that the defendant discharged the plaintiffs from performing the part of the memorandum of charter relating to the sailing of the ship from *A.* to *C.*, until she had completed the loading of the coals at *A.*: that being so loaded, the ship proceeded to *B.*,

and arrived there on the 10th of *January*, and took in the remainder of her cargo. The breaches of promise assigned were, first, that the defendants detained the ship at *B.* twenty days over and above the lay-days and the days of demurrage, whereby the plantiffs were put to expence in maintaining the master and mariners, and whereby a large sum of money became payable to *the plaintiffs* for demurrage; secondly, that the defendants further detained the ship at *C.*, whereby the plaintiffs were put to further expense in maintaining, &c.; thirdly, non-payment of freight; fourthly, non-payment of demurrage.

The defendant pleaded, *inter alia*, to so much of the first count as related to the claim for demurrage, that he did not *consent and request* that the ship might remain at *A.*

Upon a trial of the issue taken by this plea, it was found by the jury that the defendants had *consented* to the new arrangement, but that the *request* was made not by the plaintiffs but by the defendants.

Held, that consent only was material; and that the verdict so found upon this issue was a verdict for the plaintiffs.

Held also, that it was not a condition precedent to the claim to the demurrage, that the ship should be at *B.* on the 16th of *December*; and that, consequently, it was not an objection to the declaration that it contained no averment that the ship was at *B.* on that day.

But held, that the declaration was bad, in not shewing that the plaintiffs were the owners for whom the memorandum of charter was made. *Galloway* v. *Jackson and Another.* Page 960

2. The ownership of goods laden on on board a general ship, is *primâ facie* in the party who was possessed of the ship at the time the goods were received on board. *Branker and another, Assignees, &c.* v. *Molyneux.* 84

3. *A.* has a sufficient property in goods shipped by *B.* for the specific purpose of placing funds in the hands of *A.* to meet a bill drawn by *B.* upon *A.* to entitle *A.* to maintain trover, although no bill of lading is executed, and *A.* holds merely a receipt signed by the mate of the vessel, acknowledging the shipment of the goods, "to be delivered to *A.*" *Evans and Another* v. *Nichol and Another.* 614

4. *A.* orders a rudder to be made by *B.*, a ship-builder for *A.*'s ship; *B.* begins to make a rudder, which he states is intended for *A.* Before this intention is communicated to *A.*, and before the rudder is finished *B.* becomes bankrupt. After the bankruptcy, *A.*, who is a creditor of *B.*, is informed that the rudder was *intended* for him, and takes it away. Held, that this acquiescence on

the part of *A.* having relation to the prior intention of *B.* was evidence to go to the jury of an appropriation of the rudder, so as to negative the property of the assignees therein. *Goss and another, Assignees, &c.* v. *Quinton.* Page 825

5. Held, that a stipulation in a contract for the purchase of a ship made with a ship-builder, that a certificate shall be delivered to the purchaser by the builder for purpose of enabling the former to obtain a register as owner under the ship-registry act (3 & 4 *W.* 4. *c.* 55.) before the masts are on board, and before the ship is in a sufficiently forward state for the measurements to be made by that act, does not render such contract illegal. *Ibid.*

SIGNATURE.

See FRAUDS, STATUTE OF.

SIGNING JUDGMENT.

See JUDGMENT.

SPECIAL CASE.

See CASE.

SPECIAL JURY.

A rule for a special jury obtained by the defendant (or by the plaintiff in replevin) will be discharged if there be unnecessary delay in serving it. *Phelps* v. *Keiley.* 883

SPECIAL PROMISE. 467 n.

SPIRITUAL ATTENDANT.

Restricted by law of France as to taking legacy from testator. Page 773 n. (*a*)

STAMP.

1. During a negotiation for the tenancy of furnished apartments for a less term than three years, and after the defendant had taken possession, the defendant wrote, and the plaintiff signed the following memorandum: — "I shall be happy to allow Mr. *B.* to leave the apartments without any notice, if he finds any thing which may at all lead him to suspect that there is any embarrassment in his landlord." Held, admissible in evidence without a stamp. *Bethell* v. *Blencowe.* 119

2. Upon an unstamped paper, bearing two agreements between *A.* and *B.*, *A.* procures one agreement stamp, to be affixed for the pose of an action upon one of the agreements. Held sufficient to render the paper admissible in evidence in such action, although the other agreement had been acted upon. *Evans* v. *Pratt.* 759

STATUTE.

See PLEADING.

I. 21 *Jac.* 1. *c.* 3.
See PATENT.

II. 29 *Car.* 2. *c.* 3.
See FRAUDS, STATUTE OF.

III. 3 & 4 *W.* 4. *c.* 42. *s.* 17.
See DETINUE.
WRIT OF TRIAL.

IV. 1 & 2 *Vict. c.* 110. *s.* 18.
See DECREES.
EXECUTION.
MALICIOUS ARREST.
ORDERS, &c.

1. Where the language of an act of parliament obtained by a company, imposing rates upon the public is ambiguous, or that construction is to be adopted which is most favourable to the public.

Where, therefore, an act of parliament contained a section, one clause of which authorised a railway company to demand a rate not exceeding 4*d.* per mile upon *all coal* carried along the railway, and a subsequent clause of which directed that for *all coal* shipped for *exportation* a rate not exceeding ½*d.* per ton per mile should be charged; the second part of the clause is to be read as an *exception* engrafted upon the first; and coals shipped for *London* are coals shipped for the purpose of *exportation*. *Stockton and Darlington Railway Company* v. *Barrett*. Page 956

Where an act of parliament directed that a railway company should take a lower rate of tonnage upon goods conveyed by the railway and shipped in the port of *A.*, goods shipped at a place within the legal port of *A.*, but at some distance from the town of *A.*, were (under the circumstances) held to be entitled to the benefit of the reduction, though the act had previously spoken of the port and town of *A.* *Ibid.*

STEAM-VESSEL.
See CASE.
VENDOR AND PURCHASER.

STEEPLE-CHACE.

1. In a memorandum respecting a race, the race is described as "four miles across a country." Held, that evidence was admissible to shew that "across a country" means that the riders are to go over all obstructions, and are not at liberty to avail themselves of an open gate. *Evans* v. *Pratt*. Page 759

STEWARD.
See 222 n.
HUNDRED-COURT.

SUMMONS.
See PRACTICE.

SURETY.
See BANKRUPT.

SURGEON.
See MEDICAL ATTENDANT.

1. A surgeon forbore to send in his bill for medicines and attendance to a deceased patient in her lifetime, under the expectation of a legacy. On her death, finding she had left him nothing, he made a claim on her executors. Held, that he was entitled to recover, no proof having been given of any

understanding between the parties that he was to be paid only by legacy. *Baxter* v. *Gray and Another, Executors, &c.* Page 771

SURRENDER.

1. Debt, upon a parol demise. Plea: that during the term it was agreed that the defendant should relinquish the possession to the plaintiff for a month, after which the possession should be resumed by the defendant; and that the defendant did relinquish the possession, but the plaintiff would not restore the possession. Held bad as not shewing a surrender or eviction. *Dunn* v. *Di Nuovo.* 105

TENANCY.

See STAMP.

1. Tenancy from year to year, pleadable as a tenancy for the number of years during which it continues. 510 n. (*a*)
2. Tenancy at will, how converted into tenancy from year to year. 512 n. (*a*)

TITHES.

See FEIGNED ISSUE.

TOLZEY COURT.

619 n. (*c*).

TRESPASS.

See BANKRUPT.
INCLOSURE ACT.
PLEADING.

Where it lies. Page 863. 903

TROVER.

Where it lies. 251 n. (*a*)

And see GOODS.
INDENTURE.
SHIP.

VARIANCE.

See AMENDMENT.
APPOINTMENT.
BILLS AND NOTES.

VENDOR AND PURCHASER.

See FRAUDS, STATUTE OF.

I. Property, at whose risk.

1. To a count in assumpsit by *A.* against *B.* upon a contract by *B.*, safely to carry in a steam-vessel certain goods of *A.* from Belfast to Dublin, and from Dublin to London, and to deliver the same at London to *A.*, or to his assigns upon payment of freight,—assigning a breach in the non-delivery of the goods in London,—*B.* pleaded that the goods were put on board under a bill of lading, by which they were made deliverable to *A.* or his assigns, on payment of freight, that after the arrival of the vessel at London, *B.* caused the goods to be unshipped and safely landed and deposited

upon a certain wharf at London, there to remain until they could be delivered according to the bill of lading, such wharf being a place at which goods conveyed in steam-vessels from Dublin to London were accustomed to be landed and deposited, for the use of consignees, and a place fit for such purpose; and that the goods, whilst they remained upon the said wharf, and before a reasonable time for delivery had elapsed, were accidentally destroyed by fire. It was further pleaded that after the arrival of the vessel at London, *B.* was ready to deliver the goods to *A.*, or his assigns, but that neither *A.* nor his assigns was or were there ready to receive the same; whereupon *B.* caused the goods to be landed on the said wharf, there to remain until *A.* or his assigns should come and receive the same, or until the same could be conveyed and delivered to *A.* or his assigns; with the like averment as to the wharf being a usual and fit place; and that the goods, whilst they remained upon the wharf, and before *A.* or his assigns came or sent for the same, and before *B.* had been requested to deliver the same to *A.* or his assigns, or a reasonable time for conveying them from the wharf to *A.* or his assigns had elapsed, and before the same could be removed therefrom, was accidentally destroyed by fire.

Held — in affirmance of the judgment of the court of Common Pleas upon demurrer to these pleas — that both pleas were bad in substance; inasmuch as they neither shewed a delivery of the goods to *A.*, or his assigns, nor alleged that a delivery at the wharf was a delivery according to the usage of London, with respect to goods on such a voyage, or that *A.*, or his assigns, had notice of the arrival of the goods, or that a reasonable time for *A.*, or his assigns, to receive them, had elapsed, when the goods were landed or when they were destroyed, or that *A.*, or his assigns, had notice that *B.* was ready and willing to deliver the goods; and that, if, as the goods were deliverable to *A.*, or his assigns, *B.* was not bound to deliver them until he had notice that *A.*, or some assignee would receive, or until the party entitled should come to receive them, still *B.* was bound to keep the goods on board (or on the wharf at *B.*'s own risk) for a reasonable time, to enable the consignee to fetch them; and that *B.* continued liable until such reasonable time had elapsed. *Bourne* v. *Gatliffe.* Page 648

B. also pleaded that he did deliver the goods at London according to his promise. Upon the trial of this issue, evidence was admitted on the part of *A.* of former dealings between himself and *B.*, as to the carriage of goods from *B.*'s wharf to *A.*'s place of business. Held — upon a bill of exceptions — that such evidence

was admissible for the purpose of shewing the course and usage of delivery in the port of London; though for the purpose of adding to, or otherwise varying the terms of the written contract, it would have been inadmissible. Held, also, — upon a bill of exceptions, — that the judge was warranted in declining to tell the jury that a delivery at the wharf was, in point of law, a sufficient delivery, that *B.* was thereby discharged from all further responsibility, and that no contract could be inferred from the course of dealing, to vary, or superadd to, the written contract contained in the bill of lading; and in stating that it was a question for the jury, whether there had been a delivery of the goods, and that it was for them to say whether, upon the evidence, a delivery at the wharf was a delivery according to the usage and practice of delivering goods observed in the port of London.

In another count, — on a promise that in consideration of the previous delivery of goods to be so carried to London for freight, and of the employment of *B.* by *A.* for other reward, to take care of the goods at the wharf, where they should be landed, and to carry and convey the same from such wharf, to *A.*'s place of business, and there to deliver them to *A.* in a reasonable time after landing, — a breach was assigned in the non-delivery of the goods, although time for that purpose had elapsed. *B.* pleaded, that after the arrival of the steam-vessel in London with the goods on board, and after the goods had been safely landed on the wharf, *B.* caused the same to be safely deposited and stored upon the wharf until they could be conveyed therefrom, and delivered to *A.*, the wharf being a usual, fit, and proper place for that purpose; and that *B.* took care of the goods whilst they remained upon the wharf, until afterwards, and before they could be conveyed from the wharf, and before a reasonable time for their being so conveyed, or for the delivery thereof to *A.* had elapsed, the goods were destroyed by accidental fire; by means whereof, and from no other cause, and without any carelessness, negligence, or improper conduct, or want of due care in *B.*, *B.* was prevented delivering the goods to *A.*

Held — in reversal of judgment of the court of Common Pleas, upon a demurrer to this plea, — that the plea was a good answer to the count; inasmuch as the contract to carry from the wharf for other reward, was not of the same nature as the contract to carry to it, and the count contained no averment that *B.* was a common carrier, and that if not subject to the liability of a common carrier whilst the goods were in the warehouse, all that *B.* was bound to do by the contract was, to take reasonable care of the

goods whilst in the warehouse. *Bourne* v. *Gatliffe.* Page 643

WAGER.

See HORSE-RACE.

WAGES.

See ASSUMPSIT.

WAIVER.

See ARBITRAMENT.

WARRANT.

See FALSE IMPRISONMENT.
FALSE RETURN.
HIGHWAY.
MALICIOUS ARREST.
REPLEVIN.

WARRANT OF ATTORNEY.

See BANKRUPT.
BILLS AND NOTES.

1. Where the attesting witness to a warrant of attorney could not not be found, the court allowed judgment to be entered up on an affidavit that the defendant had acknowledged his liability, and also that the attestation was in the handwriting of the party whose name was subscribed as attesting witness. *Reid* v. *Ford.* 546
2. A witness for the plaintiff attended in court, in obedience to a subpœna, but was absent, through negligence, when the cause was called on, and the record was, in consequence, withdrawn. There appearing to have been no wilful contempt, the court discharged a rule for an attachment, but without costs. *Chapman* v. *Davis.* Page 609

WARRANTY.

1. Upon the sale of a barge by the builder, a warranty of fitness for the purpose for which it is known by the builder to be purchased, is implied, notwithstanding a written instrument containing the terms of the sale, is silent as to any warranty. *Shepherd* v. *Pybus.* 868
2. But if the vendee declares, as upon a warranty, that the barge was reasonably fit for use, and assigns a breach in the barge not being reasonably fit for use, the breach is not supported by evidence that the barge was not fit for a special purpose for which the builder knew that it was designed. *Ibid.*

WASTE.

See 314 n. (*h*).

WAY-WARDEN.

See REPLEVIN.
HIGHWAY.

WHARF.

See VENDOR AND PURCHASER.

WILL.

See DEVISE.

WITHDRAWING RECORD.

See JUDGMENT AS IN CASE OF A NONSUIT.

WITNESS.

See JUDGMENT AS IN CASE OF A NONSUIT.

WARRANT OF ATTORNEY.

1. It is too late to object to the competency of a witness, when such witness, after having been examined upon matters on which the objection to the competency might have been taken, has left the box, and is recalled for another purpose in respect of which the objection also arises. *Wollaston and Others* v. *Hakewill.* Page 297

WRIT OF TRIAL.

1. Detinue, where the article sought to be recovered is indorsed on the writ of summons, and of the value of 20*l.*, may be tried before the sheriff under the 3 & 4 *W.* 4. c. 42. s. 17. *Walker* v. *Needham.* 557
2. In order to raise the question whether a case is triable before the sheriff, the proper motion is not for a new trial, but to set aside the writ of trial and the proceedings thereon. *Walker* v. *Needham.* Page 557
3. On a motion for a new trial in a cause which has been tried before the sheriff, the party shewing cause must be provided not only with an office copy of the affidavits on which the rule has been obtained, but also of the sheriffs' notes. *Ibid.*
4. Quære whether a defendant, by consenting to a judge's order, directing a writ to issue for the trial of the cause before the sheriff, waives any objection to the want of jurisdiction in the sheriff. *Ibid.*
5. Assumpsit for not returning goods let to hire, in which the damages laid in the declaration are under 20*l.*, is not within the writ of trial clause (s. 17.) in the 3 & 4 *W.* 4. c. 42. *Collis* v. *Groom.* 850

   And where such an action had been tried before the undersheriff, the court set aside the writ of trial and the subsequent proceedings. *Ibid.*

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